(18,583.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 71.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY AND THE PHILADELPHIA, WILMINGTON AND BALTIMORE RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

CATHARINE LANDRIGAN, ADMINISTRATRIX OF THE ESTATE OF THOMAS J. LANDRIGAN, DECEASED.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia.

THE BALTIMORE & POTOMAC RAILROAD COMPANY ET AL., Appellants,
vs.
CATHERINE LANDRIGAN, Administratrix, &c. } No. 1168.

a Supreme Court of the District of Columbia.

CATHARINE LANDRIGAN, Administratrix of the Estate of Thomas J. Landrigan, Deceased, Plaintiff,
vs.
THE BALTIMORE & POTOMAC RAILROAD COMPANY and The Philadelphia, Wilmington & Baltimore Railroad Company, Defendants. } At Law. No. 42828.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration.*

Filed February 25, 1899.

In the Supreme Court of the District of Columbia.

CATHARINE LANDRIGAN, Administratrix of the Estate of Thomas J. Landrigan, Deceased, Plaintiff,
vs.
THE BALTIMORE & POTOMAC RAILROAD COMPANY and The Philadelphia, Wilmington & Baltimore Railroad Company, Defendants. } At Law. No. 42828.

The plaintiff, Catharine Landrigan, to whom letters of administration have been duly issued and granted by the supreme court of the District of Columbia upon the estate of Thomas J. Landrigan, deceased, late of the District of Columbia, sues the defendants, The Baltimore & Potomac Railroad Company and The Philadelphia

Wilmington & Baltimore Railroad Company, bodies corporate, having officers and agents and doing business in the District of Columbia, for that the said defendants, heretofore, to wit, on the 29th day of August, 1898, and for a long time prior thereto, the defendant The Baltimore & Potomac Railroad Company owned, managed, and controlled a certain railroad operated by steam, together with tracks, cars, and locomotive engines; that the said railroad tracks were and are located on certain streets and avenues in the city of Washington, District of Columbia, and intersect and cross certain others; that, among others, said tracks were and are located upon and along what is known as Virginia avenue southwest, and intersect and cross what is known as South Capitol
2 street; that the defendant The Philadelphia, Wilmington & Baltimore Railroad Company also was and is accustomed to operate and use, under lease, license, or permission from the defendant The Baltimore & Potomac Railroad Company, sundry of said tracks, including that on Virginia avenue southwest at its said intersection with said South Capitol street, and it then and there became and was the duty of the said defendants to guard and protect the public from all trains and engines propelled upon said tracks, and properly and securely to fasten and couple together and properly and securely to furnish and equip their said cars with safe and efficient brakes, and to give timely warning and notice of the approach of all engines and cars upon said tracks to all persons desiring to cross said tracks at the intersection of the aforesaid street and avenue, and it then and there became and was the duty of the defendants to keep a diligent and careful lookout upon all moving cars and engines for persons crossing said tracks, and to have and to keep lights on the ends of their said cars when being propelled or moved along said tracks after dark.

Yet the defendants, on, to wit, the 29th day of August, 1898, disregarding their duty in the premises, so carelessly, negligently, and improperly conducted themselves in this behalf that at the time and place aforesaid Thomas J. Landrigan, plaintiff's intestate, while attempting to cross said Virginia avenue southwest at its said intersection with said South Capitol street, upon the public highway in said city, as he had a right to do, was, through the carelessness, negligence, and improper conduct of the defendants, thrown down and run over by a car or cars operated as aforesaid and running backwards upon one of said tracks operated as aforesaid by the defendants, said car or cars
3 being then under the management and control of the defendants' agents, servants, and employees; that the defendants, by their agents, servants, and employees, were, on, to wit, on the day and year last aforesaid, at a late hour at night, shifting or causing to be shifted certain cars, and so negligently, carelessly, and improperly coupled together their said cars, and so negligently, carelessly, and improperly failed to furnish and equip said cars with safe and efficient brakes, and so negligently and carelessly and improperly failed to give any proper notice or warn-

ing of the movement of said cars by having and keeping a light or lights upon the ends of said cars, or by the ringing of bells, or blowing of whistles, or by giving other signs, notices, or warnings, that the said Thomas J. Landrigan while in the act of crossing said railroad tracks, as he had a right to do, and without any want of due or reasonable care on his part, was thrown down and run over and killed by one of said cars, being shifted as aforesaid, breaking loose and running back upon him without any notice or warning of the approach of said car, so running backward upon the said Landrigan as aforesaid; that the said Landrigan, had he not been killed by the said wrongful act, neglect, and default of the said defendants' agents, servants, and employees, as aforesaid, could have maintained an action and have recovered damages for the said wrongful act, neglect, and default as aforesaid; that the plaintiff's intestate left him surviving a widow, a mother, a brother, and a sister, and by reason of the premises and the statute in such case made and provided an action for damages hath accrued to the said plaintiff, to wit, in the sum of ten thousand ($10,000) dollars; therefore the plaintiff sues; and the plaintiff claims of said defendants
4 the sum of ten *dollars* ($10,000) dollars, besides the costs of this action.

J. J. DARLINGTON,
DOUGLASS & DOUGLASS,
JOSEPH D. WRIGHT,
Attorneys for Plaintiff.

Notice to Plead.

The defendants are to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

J. J. DARLINGTON.
DOUGLASS & DOUGLASS.
JOSEPH D. WRIGHT.

Plea.

Filed March 16, 1899.

In the Supreme Court of the District of Columbia.

CATHARINE LANDRIGAN, Administratrix of the Estate of Thomas J. Landrigan, Deceased, Plaintiff,
vs.
THE BALTIMORE & POTOMAC RAILROAD COMPANY and The Philadelphia, Wilmington & Baltimore Railroad Company, Defendants.
} At Law. No. 42828.

The defendants, for plea, say that they are not, nor is either of them, guilty as alleged.

F. D. McKENNEY,
Attorney for Defendant.

5 *Memorandum.*

October 24, 1901.—Verdict for plaintiff for $6,500.00.

Supreme Court of the District of Columbia.

FRIDAY, *November* 8, 1901.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

CATHARINE LANDRIGAN, Administratrix of Estate of Thomas J. Landrigan, Deceased, Plaintiff,
vs.
THE BALTIMORE AND POTOMAC RAILROAD Company and The Philadelphia, Wilmington and Baltimore Railroad Company, Defendants. } At Law. No. 42828.

This cause coming on to be heard upon the motion of the defendants for a new trial, it is considered that said motion be, and hereby is, overruled and judgment on verdict ordered; therefore it is considered that the plaintiff recover against the defendants six thousand five hundred dollars ($6,500) for her damages as aforesaid assessed, together with her costs of suit, to be taxed by the clerk, and have execution thereof.

6 *Appeal.*

Filed November 27, 1901.

In the Supreme Court of the District of Columbia.

CATHERINE J. LANDRIGAN, Administratrix of Thomas J. Landrigan, Deceased, Plaintiff,
vs.
THE PHILADELPHIA, WILMINGTON & BALTIMORE Railroad Company and The Baltimore & Potomac Railroad Company, Defendants. } At Law. No. 42828.

And now come the defendants, The Philadelphia, Wilmington & Baltimore Railroad Company and The Baltimore & Potomac Railroad Company, and appeal to the Court of Appeals of the District of Columbia from the judgment rendered against them in the above-entitled cause on November eighth (8), 1901.

F. D. McKENNEY,
Attorney for Defendants.

Citation in this case waived.

DOUGLASS & DOUGLASS.

Memorandum.

November 27, 1901.—Bond on appeal filed.

7 Supreme Court of the District of Columbia.

FRIDAY, *December* 20, 1901.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

CATHERINE LANDRIGAN, Adm'x, Plaintiff,
vs.
THE BALTIMORE & POTOMAC R. R. CO. ET AL., Defendants. } At Law. No. 42828.

Upon motion of the defendant, it is ordered that the time in which to present the bill of exceptions to the court be, and hereby is, extended until the 27th day of December, 1901, inclusive.

* * * * * * *

FRIDAY, *December* 27, 1901.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

CATHARINE LANDRIGAN, Adm'x, Pl'tiff,
vs.
THE BALTIMORE & POTOMAC R. R. ET AL., Def'ts. } At Law. No. 42828.

Now come here again the defendants, by their attorneys, and tender to the court here their bill of exceptions taken during the trial of this case, and pray that the same may be duly signed, sealed, and made part of the record, now for then, which is done accordingly.

8 *Bill of Exceptions.*

Filed December 27, 1901.

In the Supreme Court of the District of Columbia.

CATHARINE LANDRIGAN, Administratrix of Thomas J. Landrigan, Deceased,
vs.
THE BALTIMORE & POTOMAC RAILROAD Company *et al.*, Defendants. } At Law. No. 42828.

Be it remembered that the above-entitled cause came on for trial before Chief Justice Bingham and a jury on October 16, 1901, Messrs. J. J. Darlington, C. A. Douglass, and J. D. Wright appearing on behalf of the plaintiff, and Messrs. F. D. McKenney and J. S. Flannery on behalf of defendants.

And thereupon the plaintiff, to maintain the issues upon her part joined, gave evidence by the following witnesses tending to prove as follows:

CHARLES J. MOTLEY testified that he resided at #318 Third street southeast, Washington, D. C., and had been in the employ of the Philadelphia, Wilmington & Baltimore Railroad Company for nine years; in August, 1898, he was employed by said railroad company as flagman and extra conductor engaged in the shifting operations around the "Jersey yards" of said company; on the night Landrigan was killed he was acting as conductor and was engaged in making up trains; the "Jersey yards" extended from South Capitol street east to New Jersey avenue; the engine yard or round-house yard is also a part of what is called the "Jersey yards;" the round-house is on South
9 Capitol street, south of the South Capitol Street crossing; at this crossing there are four tracks, the farthest to the north, next to the Government reservation, being used for shifting purposes, the two tracks immediately south of it being the north and south bound main tracks, and the most southerly track being what is called the "lead" or "ladder" track; this "ladder" track was used for shifting purposes, for shifting out cars; all the tracks in the "Jersey yard" lead into the "ladder" track; said "ladder" track, from one end of it to the other, runs all the way from F street southwest to I street southeast and crosses South Capitol street; on the night of the accident to Landrigan witness was the yard conductor engaged in making up a train of tourist or passenger cars to go south; he had pulled eight or nine cars out on the "ladder" track, and while these cars were standing upon the "ladder" track the last car broke away, ran down the "ladder" track, which is an ordinary downgrade from the point where the car broke away, towards South Capitol street; at the time the coach broke away it was coming out on the "ladder" track, and the break occurred at a point leading into a switch at a little curve; this coach had been taken from one of the storage tracks and had been brought out on the "ladder" track; witness coupled the coach himself with the assistance of Brakeman Wilhoit and Mr. Hottal, the yardmaster, who was there to give him the signal; the car that broke away was a Pullman, and the car to which it had been coupled was a tourist car; the Pullman had a Janney coupler, and there was a Miller coupler on the tourist car; the Miller and Janney couplers would not couple—they were not made or intended to couple together; one was a little higher than the other, the Janney being the higher of the
10 two, but do not remember whether or not one went over the other; one of the drawheads also was higher than the other; it was a very difficult coupling to make, and a link and pins had to be used to couple the cars together; this difficulty arose from the fact that they were not the same sort of couplers; that he did not know whether the difference in height made them less or more difficult to couple; he coupled the two cars in question by putting a link in the Janney coupler and putting a pin through the hole in that coupler, then laid the link on top of the Miller coupler and put a pin down through it; in both the Janney and Miller couplers there is a slot for a link and also a hole for the pin to go in; he

did not put the link in the slot of the Miller, because he could not get it in there; that he could not explain why he did not do it that way; it was a difficult coupling to make either way; he did not remember whether they tried to do it that way or not; he coupled it the best way he could—the easiest way he could couple it; he did not remember whether the difference in the height of the two couplers had anything to do with causing him to put the link on top of the Miller coupler instead of placing it in the slot of the Miller; he did not remember whether it was on a curve or on a straight track when he coupled the cars together; the pin held the link in position on top of the Miller coupler; the link could not very well go over the top of the pin which held it in place; leading over the switch, the two couplers rubbing together forced the pin up out of the hole, so as to pry it up. If he were coupling two cars together the drawheads of which came together plumb and even, one being as high as the other, and each con-
11 taining a slot for a link and a hole for the insertion of the pin, in coupling them with a link and pin, he would put the link in the slot and not on top of the coupler; on this occasion he laid the link on top of the Miller instead of putting it in the slot, because that was the easiest and best way and the only way he could couple it; the link was too short to put it in the slot of the Miller coupler, but the link was long enough to enable the pin to go down through the hole; where the link is laid on top of the coupler instead of in the slot he does not know what would be the effect upon the rear coach if a slack should take place by the cars coming together; that the coupling which he made was a very ordinary coupling and is made right along; possibly it might hold all right; he had never seen it break loose before; it was customary to couple cars by putting the link on top instead of through the slot; this coupling was caused to break away by the slack running up between the cars when they jolted together—by the Janney and Miller couplers running up together; the rubbing together made the pin raise up and broke it loose; when coaches are properly coupled together they break loose very often in that way; when two cars are properly coupled with the link and a slack is produced causing them to bump together, they come apart sometimes, although this is very rare and it is also very rare that the other coupling comes apart; when the car broke away he yelled to the rest of the crew who were on the rear end of the car; he was standing on the steps of the tourist car on the end next to the Pullman, which broke away; this Pullman car was called the "Lylete;" he does not remember what became of the link or pin after the car broke away; he looked at the "Lylete" and saw the link, but did not look at it particularly; he did not remember the words he used when he called to the
12 crew; the men on the car, Hottal and Wilhoit, did all they could to stop it; he saw these men putting the brake on at the end of the Pullman car next to him, but could not see what they did at the other end; he did not know

whether they left the end next to him for the purpose of putting the brakes on the other end; the car ran a little over a hundred yards probably before it stopped; it was stopped by striking some cars down on the "ladder" track; these cars were loaded with sand and coal, as well as he remembered; the end of this "ladder" track in the neighborhood of South Capitol street was used for shifting purposes and for putting cars or anything there they wanted to store there; he has never seen passenger coaches stored down there because it is not long enough for that; the only cars he ever saw stored there were freight cars. Said witness further testified that he saw Landrigan that night, and when he first saw him he was lying on the ground near to and south of the "ladder" track at South Capitol street; Landrigan was at the side of the "ladder" track, at the intersection of South Capitol street; Mr. Fenton was fixing up his wounds; Landrigan was afterwards carried away in an ambulance and died in a hospital the next morning; at the time witness saw him he looked like he was pretty badly mashed up—looked like he had been run over; that it was about 11.55 p. m. when he saw him; Landrigan lived at 31 or 33 Virginia avenue, on the north side of the railroad tracks; he was a machinist and employed on the night force in the round-house; he had known Landrigan about three years, during all of which time Landrigan had been in the employ of the railroad company. There was a white light in the vestibule of the Pullman car that broke away—in the little dome-shaped arrangement in roof of the car; this
13 was the only light hanging in the vestibule, and there was no light on the platform; the link and pin used in making the coupling were the ordinary link and pin; that two Janney or two Miller couplers will couple together without requiring the use of a link and pin, but a Janney and Miller coupler will not couple of themselves and you have to use a link and pin to couple them; that the Miller and Janney couplers were not intended to couple together.

And thereupon said witness, on cross-examination, further testified that at the southwest crossing of South Capitol street there were four railroad tracks, the first track from the south being the ladder track, the track immediately to the north of it being the north-bound main track, the next track to the north the south-bound main track, and the fourth track or the one on the north side of the crossing being called the reservation track—a freight track; that the ladder track extended west of the crossing to an alley (the witness indicating a point on the map about a square and a half distant), and east of the crossing it extended to K street southeast; the round-house was a little to the south and east of the crossing and there were tracks connecting it with the ladder track; east of the crossing of South Capitol street were the "Jersey yards" of the company, and all of the tracks in that yard connected with the ladder track; that this is why it is called the "lead or ladder track;" the gateman's box at the southwest crossing is at the northeast corner of the crossing, and at the southeast crossing of South Capitol street it is at the southeast corner; on the west side of South Capitol street

there is a pavement leading up to the southwest crossing; there were safety gates on both sides of the railroad track at this
14 crossing, and between the end of the gate on the south side and the tool-house west of the southwest crossing, which is marked on the map, there was a fence, five feet high, which extended up to the gate; that between the ladder track and this fence there is an open or vacant space; between the south rail of the ladder track and this fence or the crossing gates there is a space of about 10 ft.; a person could not walk around the end of the gate and get on the track. Said witness further testified that the ladder track on that night had been in use in their shifting operations from about 7 or 7.30 o'clock; that in these shifting operations they would go all the way down to the crossing at South Capitol street if necessary, but witness did not remember going all the way down there that night; on other nights they had been in the habit of going all the way and crossing South Capitol street when engaged in shifting operations; the ladder track was a track that was used more or less frequently in shifting operations from one end of it to the other; cars were put on the ladder track west of South Capitol street to be unloaded or just to get rid of them for a short while, sometimes; they would put them there so as to have them where they could get hold of the cars handy; they would be put there temporarily during shifting operations. It was not customary to handle passenger cars on that side at the southwest crossing of South Capitol street; witness and his men were freightmen ordinarily, but are called upon now and then to handle passenger cars; on the night of the accident they were handling passenger cars and were making up a train of tourist cars in which to load soldiers to go South; in the shifting operations in the yard in August, 1898, different kinds of cars would be received there—
15 foreign cars belonging to different roads—especially at that time when soldiers were traveling there was a great deal of traffic and they were moving a great many troops; on these cars they would find a great many Miller and Janney couplers; it was more usual to find Miller couplers on foreign cars in August, 1898, than it is today; they are seldom seen now; it was an ordinary occurrence at that time in the yard to couple cars up with Miller and Janney couplers on them; the Miller and Janney couplers are entirely different and will not couple of themselves; they must be coupled by putting a pin in the Janney and another pin in the Miller and connecting the two with a link; this is the ordinary way of coupling two such cars, and the only way that the witness knew to couple them. Witness followed the runaway car down to the crossing after he got rid of the rest of the cars; he reached there about three minutes after the car passed over the crossing; that he forgets whether he noticed the condition of the gates at that time; the crossing was lighted by the street lamps located on each of the four corners, and there was an electric light in the reservation north of the tracks (indicating a point on the map northeast of the intersection of South Capitol street and the railroad tracks) and another one south and

east of the tracks near the signal tower; the lamp in the dome of the vestibule of the Pullman car had a white shade or globe underneath; it gave a bright light—you could see it all right; the lamp was inside of the door and the door was closed; the glass in the door extended about half way down and the light shown through the glass in the door; you could see the light very plainly as you looked at it; the same sort of a light was in both ends of
16 this car. Said witness further testified that if they had not made a link and pin coupling they might have pulled the cars out with a big, heavy chain; a chain is used sometimes when the drawhead is pulled all the way out; where there are two drawheads with a coupler in each drawhead, the ordinary way to couple them is to use a link and pin whenever the couplers are not alike.

And thereupon, on redirect examination, said witness further testified that he supposed, to guess at it, that the car ran probably a hundred yards from the place where it broke away until it hit Landrigan, and then about twenty-five yards after it hit him before it stopped. Said witness further testified that there were two crossings at South Capitol street, the southwest and southeast crossings; the street was divided by parking which ran in the center of it; these two streets or crossings were about 50 ft. apart; Landrigan was killed at the southwest crossing; the railroad tracks where they intersect with South Capitol street are on Virginia avenue. The nearest electric light to the point where Landrigan was killed was on the east side of the southeast crossing and north of the tracks; this light was about 75 yrds. from where Landrigan was struck. There were nine coaches attached to the engine when the car broke away. The car that broke away was the last coach; Hottal, the yardmaster, was present when witness coupled the cars together; that witness told him that he could couple them up the way they were coupled, and Hottal said, "Couple them up some way, and get them out of here;" at that time the crew was waiting for the car on the main track, and they were in a hurry to get it out; he was having some difficulty to get it coupled when he made this remark at Hottal; it is not true that the cars would not couple at all—they would not couple without
17 using a link and pin; the coupling was safe enough to pull the car out of the yard, and that was all that was wanted; it did not do it on that night because it broke loose; nothing extraordinary happened to make it break loose; the Janney coupler was about 2½ inches higher than the Miller, but he did not think that the Janney slid all the way over the Miller when they came together; he did not remember testifying at the former trial of the case that "the Janney went clean over the top of the Miller;" the Janney coupler, the lip of it, would not be over 2½ inches thick, which would pretty nearly take it over; it was about 2½ inches higher than the other, but he does not remember whether it went over it or not; whatever he testified to at the former trial was true; the couplings "slipped around," he supposed, when they were going around the curve, and that had a tendency to make them come apart; that he supposed it was due to the slack caused by coming over the switch on the

ladder track; that the statement made by him at the former trial that he "used a link, put a pin down through the Miller, just a temporary coupling, to pull the car up this track, and put the link over the Miller, put the pin down in the Miller, and stuck a pin through the link, and the pin having a head on it held in that position, held the link in position to pull the car out; but when it got up on the curve the slack ran together, and probably the pin dropped down; the link jumped over, or twisted off the head of the pin—that is as nearly as I can explain it to you about this coupling"—was substantially correct. Said witness further testified that after the car was coupled they pulled it probably 45 or 50 yards, and when it got on the curve formed by the ladder track and the track from which they were bringing it, it broke away;
18 that he knew this curve was there; that he did not remember testifying at the former trial that they could not stop the car because of a "defect in the brake, the brake did not hold," but that it is true that the brake might have hung in some way; the brake did not hold the car, but he does not know what was the matter with it; that he was taking the train of cars in the opposite direction from the point where Landrigan was killed, and intended to give this car to the crew that was waiting for it on the main track; the reason, as well as he remembers it, why he put the link on the top of the Miller coupler was because the Janney was higher than the Miller; they could have used a chain on that night, but did not have any to use when they wanted to get the car out; there were chains in the yard; he does not know whether the chain would have been perfectly safe or not; the car might have broken away by the chain becoming untied, or loose, or breaking, unless it was very strong; that he did not remember examining the pin on the tourist car, but remembered looking at the pin in the Lylete, the Pullman car; this pin was still in the hole in the link, and this satisfied him that the link had pulled over the head of the other pin.

And thereupon said witness, on recross-examination, further testified that the head of the pin would not go through the hole in the link and would hold it in position; that the drawhead was a big piece of iron fastened to the end of the car, and the coupler was attached to the end of the drawhead; when the drawhead is completely pulled out the coupler comes with it; when two cars are in that condition they have to use a chain to keep them together; when the cars have a complete drawhead and coupling attached, no
19 chain is necessary, and they simply used a link and pin coupling when the couplers are not alike; this was the way they did on that night; there was nothing the matter with the drawheads; they were simply different couplers and would not couple; they were getting these cars out to put them on the train that Fenton's engine was attached to; this train, as well as he remembered, was standing on the south-bound main track, facing towards the depot; when he reached the crossing after the accident he found the engine standing there on either the main track or No. 1 track, right close

to the point where Landrigan was found and about 25 yards distant; it was about northwest of the crossing, on the north side of the track, and about 10 yards from the crosssing; that he did not remember exactly the position of the engine—he saw it over there, but did not take particular notice whether it was on the crossing or not.

And thereupon, on re-redirect examination, said witness further testified that Fenton's engine and train were standing nearer the southwest crossing than the southeast crossing; the engine was headed south or towards the depot, and, as well as he remembered, about 10 ft. from the southwest crossing; that he did not remember whether or not it had any box cars attached to it.

And thereupon the plaintiff, further to maintain the issues upon her part joined, read in evidence the testimony of KENNETH D. WILLHOIT, deceased, who testified for the plaintiff at a former trial of the cause. Said witness testified that he had been in the employ of the Philadelphia, Wilmington & Baltimore Railroad Company as brakeman for five years; on the night Landrigan was
20 killed he was acting as flagman in the yard in connection with the yard engine; he did not know Landrigan personally; had seen him a number of times; he saw him after he was hurt; Landrigan's legs were run over, but he could not say whether it was by a car or another train; train No. 78, which left the depot about 11.55 or 11.35, was passing there about the time of the accident; this train No. 78 is known as the midnight express for New York and crossed South Capitol street, where Landrigan was hurt, going in an easterly direction; when witness saw Landrigan the latter was lying on the south side of the outside rail of the "ladder track," the most southerly track of the four tracks at that crossing; there is a tool-house to the west of that crossing, and a fence running along south of the tracks and in front of the tool-house; Landrigan was between this fence and the outside rail of the "ladder" track; immediately before he saw Landrigan lying there the coach "Lylete" passed over the crossing at South Capitol street and witness came right along behind this car, after train 78 passed, to see if the coach had done any damage down there and saw Landrigan lying there with some one around him; he went down where the car had stopped and came back and found out what the trouble was; that Motley was the conductor of the yard engine and Anderson the engineer; he thinks there were five or six coaches attached to the yard engine; that an ordinary passenger coach is 60 or 70 feet long; Hottal, the yardmaster, Motley, and himself made the coupling; one car had a Miller, and the other—the one that broke away—had a Janney coupler; it is impossible to couple a Miller and Janney together; it was on a curve, and therefore they used a link and pin; it was a secure coupling to pull the car around in the yard, but it was not a safe coupling to run over the road; it was sufficient for the yard and was very frequently
21 done; the couplings did not couple exactly because they did not fit; you cannot couple two such couplings to-

gether and have to use a link and pin; the Miller coupler is not as high as the Janney; it is a thinner piece of iron and the drawhead is thinner than that of the Janney; the link was put in the Janney all secure and then laid over the top of the Miller and a pin run through the top of the link and down through the hole in the Miller: there was a place in the Miller coupler for the link to go in, but it was a little lower and it could not be put in there on account of that curve; they coupled the cars right on a curve; the curve swayed the car around and brought the Miller coupler out on the side, like; when the pin was put down through the link and into the hole in the Miller coupler the head of the pin was on top of the link, and the only thing to keep the link from slipping over the head of the pin was the shoulder around the head of the pin; that he supposes it would have been safer if they could have put the link through the regular place for that purpose in the Miller coupler; when they were pulling the car out on the straight track he tried the brake and it appeared to be all right, but when some one hollered that this car had broken off he went to work on it again; it did not seem to catch hold; he dropped off the end of the car and caught the rear end of it—the head end—and at the same time Hottal got on the end that he got off of; the witness called for Wilber to help him to put the brake on and they did all they could to stop the car, but the car had got too much start; the brake seemed to work all right—he did not have any fault to find with the brake, only the car had gotten too much start;
22 he first tried the rear brake and could not get that to work; then went to the other one; while witness and Wilber were working on the forward brake Hottal jumped on and tried to work the rear brake; they did not succeed in stopping the car, because it had gotten too much of a start. He got off at South Capitol street on the southeast side, stood there for a second or two, and then ran after the car to see what damage it had done. There were some other cars down on the end of this track, that this car ran into, and it would not have been safe for the witness to have stayed on the car. He found out that the car had broken loose by some one halloaing (there were five of them around there at the time), but cannot say who it was or from which direction the sound came; the car was running slowly when he started to put on the brake. He jumped off, went to the other end, and when he got there the car was not running very fast. Hottal got on the rear end just as he got off. That he does not know whether or not he said at the coroner's inquest that "he did not think the brake was any good or else it would have stopped the car," nor could he say whether he testified at the inquest that the front brake was loose and was not doing any good. The brake did not do any good, because the car had too much start; Wilber jumped off with him; that you sometimes apply a brake and it does not "take up" right at first; that he could not say whether he noticed any slacking up of the car as a result of putting on the brakes, because he got off, and it was dark, night-time, and he could not see; that he could not say

whether he noticed any slacking up before he got off the car, because the brake had not taken any hold, so far as he knew; both Wilber and himself put the brake on as hard as they could; there was a light on both ends of the coach; there was a light in the coach, but none on the back platform; when he jumped off he did
23 not exactly keep up with the car, but followed it down because 78 was coming at that time and he was afraid the runaway car would knock some of the cars out on the main track, and he followed down to see whether there was any trouble; that he practically kept up with the car, but was a little distance behind it; the car ran across the southeast and southwest sides of South Capitol streets, beyond the point where Landrigan was, and into some flat cars loaded with dirt.

Said witness, on cross-examination, further testified that the Jersey yards consisted of a network of tracks between South Capitol street and New Jersey avenue, south of the main railroad tracks; that what is called the "old Jersey yard" contained tracks from *1* to *11*, and the "new Jersey yard" began with track *4* and ran up to number *9;* that on the other side or east of the Jersey yards was what is called the "engine yard;" the old and new Jersey yards are used for the storage of all passenger cars, sleepers, baggage and box cars, freight cars of all descriptions, and also as a yard to unload coal and to load different freight. There is a fence running from the southeast side of South Capitol street, from the gate-tender's box to the southwest side of South Capitol street, the side next to the tool-house; that at both the southeast and southwest crossings are crossing gates, which come right up to the fence; these gates are double gates, and if they are down it is impossible for anybody to cross the track at either of the crossings at South Capitol street without getting under them; at the southeast crossing they could walk around the end of the gate, but they could not at the southwest crossing; Landrigan was found on the southwest side of the southwest crossing and on the south side of the tracks; this "ladder" track is a
24 straight track, running from one end of the yard to the other; it is also called the "lead" track because all the other tracks in the yard lead into it; if they wanted to get a car out of the other tracks it would be pulled out on this "ladder" track; on this night they were engaged in making up an equipment of cars to carry soldiers South; there were some flat cars, stock cars, coaches, and this sleeper for the officers, he supposed; they were pulling five or six cars out to get this sleeper—the "Lylete"—to put it on the rear of the train, their intention being to shove the remaining cars back into the track from which they got them; that he saw the coupling made, but did not make it himself; when they found cars with the old-fashioned drawhead, and wanted to couple them to a car with a Janney coupler, they used a link and pin, which was the usual coupling when they got cars of that kind; this was done very frequently, but it is not done so much now as formerly because they get more cars with the new equip-

ment; that he did not say the Miller coupler was lower than the Janney, but that it was not as thick as the Janney, which made it apparently lower than the Janney when the cars came together; that they laid the link on top of the Miller because they could not get it into the groove; the top of the pin was holding it in place; the track on which the runaway car was ran parallel with—right by the side of—the track on which No. 78 was coming; he jumped off the "Lylete" on the southeast side of South Capitol street; 78 passed first and then he ran down the north-bound track behind the "Lylete;" that he saw some one was hurt when he went down, but did not stop because, by the light being in the car, he thought perhaps there was a porter or somebody in there, and ran
25 down to see what damage had been done to the car; when he saw nothing serious had happened, he came right on back to see this object; it was not over three minutes—not over two minutes—when he got back. When he got back he saw Mr. Fenton behind, attending to Mr. Landrigan, with his torch. Fenton had started to bind up Landrigan's legs; Fenton's engine was on the opposite side, on the 4th track, on the north side of the south-bound track. It was standing about on South Capitol street, on the south-east side; he does not remember whether it was all the way over the crossing or not; he thought it was. It was just across from where Landrigan was lying, and was partially on the crossing; the gates were down; he first noticed the gates when he came down there after he had jumped off the end of the car; the gates were down then on both sides of the street. He did not notice the gates before 78 passed, because he had not been down that far; he stood on the southeast side of South Capitol street until 78 passed, and then started to run down the main track, and as he ran down the track he noticed that the gates were down on both sides.

Said witness, on cross-examination, further testified that when he reached Landrigan the latter was conscious to a certain stage; he asked Fenton who it was, and Fenton said it was "Tom Landrigan." When he got back where Landrigan was, Hottal, the yardmaster, Mr. Fenton, and Mr. Bright were there, and either Mr. Hottal or Mr. Bright asked Landrigan, "How did this thing happen?" and Landrigan said, "I came under the gates and something struck me, and a whole string of cars ran over me;" that was all witness heard him say. He did not hear him say anything about train No. 78; nothing more was said that he can remember; he saw Lan-
26 drigan put in the ambulance which came up pretty soon after the accident—about as soon as they could get there; the gates were raised when Landrigan was put in the ambulance. Said witness further testified that the lead or ladder track is used all the time, backwards and forwards, on week days especially, and very frequently on Sundays for putting cars in and pulling them out; that the light in the car was in the dome—in the vestibule—just on the outside of the door, over the platform; he knows there was a light in the west end of the car, the end going toward South Capitol street—which was the front end of the car the way it was

moving; this light could be seen more plainly than a lamp; such lights contain two burners, are lighted by oil, and are more brilliant than a lantern; the reflector is over the top of the light; there is a kind of white shade over them. Said witness further testified that between the gate and the first rail of the track south of which Landrigan was found there was a clear space of about 14 or 15 feet; the tool-house set off from the gate about 17 ft., and Landrigan was nearer the tool-house than the gate; he was nearer the track than the gate, but inside of the gate. Said witness further testified that the runaway car passed the southwest crossing of South Capitol street before No. 78 reached there; it struck just the middle part of No. 78 as the train came by there; the runaway car had just about gotten across the crossing when the engine of No. 78 began to cross the crossing; it was almost at the same time.

Thereupon, upon redirect examination, said witness further testified that the light in the vestibule of the car could be seen by people on the ground; it hung down low and did not set right up in the dome; it had a shade over it, but he does not know
27 whether you could call it a reflector or not; it was plain enough to be seen by anybody who was on the ground; that he did not remember stating at the coroner's inquest that "he would expect a coupling like that to give away—that it was an unsafe coupling. Said witness further testified that there were some cars standing on the end of the ladder track; that his track is a blind track down there—it stops right at the end of the property yard; it ran alongside of the property-yard fence and stopped on the southeast side of the F Street crossing.

JOHN F. WEBSTER, a witness for the plaintiff, testified that he lived about 150 yards from the intersection of the railroad tracks at South Capitol street, and had been living there all his life, and before the tracks were put down; that he had had occasion to cross the southwest crossing of South Capitol street and the railroad tracks both in the daytime and night-time; South Capitol street is divided by the reservation in the center of it which is about 50 or 60 feet wide, thus making the two crossings; there are separate safety gates at each of these crossings; witness' house was northwest of the gates; that the gates at the southwest crossing of South Capitol street in the month of August, 1898, and prior thereto, whether trains were passing or not, were generally kept down; that was as a rule; of course he could not say they were down all the time, but as a rule they were down after ordinary bed-time; for a number of years he had occasion to cross the tracks back and forth both day and night because his business required him to go down there; that he has gone along there at 11 or 12 o'clock at night and at all hours of the night, and it
28 was his experience that these gates were always down after ordinary bed-time; that he was running a brick yard, and this caused him to go down there very often at night and to come home at all hours of the night, and he would always find the gates

down, continually; it did not make any difference whether the trains were passing or not; he has stood on the side where Landrigan was killed and crossed right over without hesitating, because he found that was the regular condition of the gates whether a train was passing or not; he did not see any effort made to raise them; he has seen them down at all hours of the night, after half past ten or eleven o'clock up to three or four o'clock in the morning; the gates were down and kept down, he supposed, until daylight; that when coming north at night, as a rule, he would have to get under the gates; that the most southerly of the four tracks at the crossing goes as far as the storage yard of the company extends; that the company has a railroad yard there where they store railroad cars, rails, coal, &c.; the south track extends westerly about 200 ft. beyond the southwest crossing; that he calls it a dead track because it does not lead anywhere, it just stops; the westerly end of this track, from the southeast crossing, is used to put in coal, railroad ties, iron, &c., for the use of the company; that is all it is used for; they put coal in there and unload it, and when they want it for their watch-boxes they haul it around to them; no portion of this track lying west of the southeast crossing is used for shifting or making up trains; that he has lived there all his life and has never seen any shifting or making up of trains at that point; he has seen
two or three flat cars there, or a load of coal or cinders, or a car
29 containing railroad ties or iron rails; that they did not store
their passenger cars there; they took them further east.

And thereupon said witness, on cross-examination, further testified that he had seen the company shifting cars on that ladder track west of the southwest crossing of South Capitol street, but they were cars loaded with coal, lumber, rails, or something for their own special use, and bases this statement upon his observation year in and year out; these cars were left there; that he has seen them shifted in, but could not say that he has seen them pulled out, but he is satisfied that this was done; that it would be necessary to pull them over this crossing in order to get them out; that it would be impossible for him to say that every flat car or box car that was shifted in there contained something directly for the use of the company, but as a rule they contained coal, rails, and such stuff as that, and he assumed that the material contained in the cars belonged to the company because it was put into the company's yard, but as a matter of fact does not know of his own knowledge that the end of that track was used simply for cars containing material belonging to the company. Said witness further testified that up to April, 1893, he was engaged in the brick business south of the tracks, which caused him to cross there night and day; that after April, 1893, and up to the spring of 1898 he had been in the habit of crossing the tracks at this crossing in the night-time on an average of about twice a week; some weeks he might have gone oftener than that; he would return across the tracks as late as twelve to half past one o'clock; since the spring of 1898 he has not paid a great deal of attention to

these crossings because he did not have much occasion to cross
30 there; he has crossed there since that time at night, but not very often; before Landrigan was killed he had occasion to cross there quite often; that he had not crossed there late at night since that time without seeing the gates down, but could not specify any particular time when this occurred; he could not recollect ever attempting to cross the tracks going south and finding the gates down when he did not see a train or shifting engine in sight; going north he has found the gates down and a train, shifting engine, or car moving in the vicinity of that crossing, and sometimes he has crossed there and found the gates down when he did not see any train, car, or engine in the vicinity; he would naturally glance up and down to see whether there was any train, car, or engine there, and naturally he would hesitate a little right on the start; west of the southwest crossing, toward the depot, there is a curve and a car, shifting engine, or train in motion would not be apt to be seen from the outside of the gate until it got around that curve; if there were any cars standing on the end of the ladder track, it would make it more difficult to see a train or engine coming from that direction, and a train standing there would naturally break the view around the curve; he has stood on the south track and seen the midnight train by going north, and in the case of this particular train he knew it was coming because he had gotten on the inside of the gate and could see around the curve and see it coming and would not undertake to cross; naturally he would look both ways before crossing. Said witness further testified that standing at the gate on the south side of the southwest crossing the gateman's box would break the view down this side track to the east if you stood outside of the gate; you could look
31 up the main track, he supposed, to New Jersey avenue, but he thought the watch-box would break your view of the south track to the east to a certain extent if you were standing outside of the gate. This box is 6 or 7 feet square; he could not say that a watch-box 6 feet square would prevent you from seeing a train if it was coming along, but it would break your view to a certain extent in looking up the track; that when you stood on the inside of the gate on the open space you could look straight up the side track to the eastward and there was nothing to break your view; that he has frequently crossed there at night and found the gates down when trains were actually about to pass, and he would see the gates down without any trains there oftener than he would see them there; when the gates were down trains might have been approaching that crossing and he not have seen them, although they must have been a good way off if he did not see them.

Said witness further testified that the tracks of the railroad company at South Capitol street are a portion of the tracks of the Jersey yard of the railroad company; at night these Jersey yards are being used almost continuously for the making up and breaking up of trains and the storage of cars; that he thought it was not a fact that the tracks at the crossing of South Capitol street are almost continuously in use at night for the company's business; that he

lived west of the southwest crossing and they shift cars in front of where he lives, but try to keep between the crossings and keep the crossings clear as much as possible. Said witness further testified that in shifting from the east—the main part of the yard—to the portion of the track which is in front of his house it is necessary to cross the South Capitol Street crossing; that they use the east more than they do the west end of the
32 tracks at this crossing; that every train of cars that is made up in the Jersey yard and goes into the depot, every freight car from the 9th Street freight station, every shifting engine that passes from the Jersey yard to the depot or to the 9th Street freight station, and every engine that comes from the south, the 9th Street freight yard or the 6th Street depot going to the round-house, pass over the South Capitol Street crossing; that aside from shifting, the use of this crossing by empty and loaded cars, empty and loaded engines, and shifting engines is almost continuous in one way or another at pretty much all times of the day and night.

And thereupon said witness, on redirect examination, further testified that he supposed the railroad company owned the material that was unloaded or stored at the end of the yard on that ladder track, because he has seen them haul coal around to the switch-box for the men to use and naturally supposed it was their material; that there is no freight yard there—it is a private yard; that he supposed the company's property goes up as far as the track extends; they used this track in connection with the storage yard of theirs. Said witness further testified that standing outside of the gates on the south side of this crossing two cars loaded with coal or other material on the end of this track would obstruct the view of a train coming from the depot, and you would have to get out on the track if you wanted to look up the track a couple of hundred yards; that the watchman's box indicated on the map was right close to the ladder track, and farther up along that track is the tower-house, which is 25 or 30 feet high; that this would
33 have about the same effect to obstruct the view as the smaller watchman's box; it would not break the view of a train coming, but would obstruct the view, and you would not have a clear view of the track; that you could see one coach looking up there. Said witness further testified that during the month of August, 1898, and subsequent to — he crossed there at night about twice a week, and the condition of the gates after the usual bed-time was about the same; he did not discover any difference in them as compared with what it was before Landrigan was killed. Said witness further testified that he stood on the ladder track on one occasion when the midnight express for New York was passing, and that he considered it a safe place.

Thereupon counsel for the plaintiff, in the course of the argument of an objection to the last preceding testimony of the witness, stated that it was admitted that Landrigan went under the closed safety gates and stood either on or by the side of the ladder track.

Said witness further testified that the shifting in front of his house was generally done on the north track; that they could only go about half way of the block on the south track.

And thereupon said witness, on recross-examination, said that he had passed there prior to the accident when he had approached this crossing during the night and found the gates up and no trains in sight.

ROBERT W. STORY testified that he had been living at South Capitol street and Georgia avenue for about forty years, and in the month of August, 1898, and for a long time previous thereto was engaged in the feed and grocery business on South Capitol
34 street, south of the railroad track; that he was familiar with the southwest crossing of South Capitol street and Virginia avenue, and had been traveling there about 15 or 20 years, both in the daytime and night-time; that sometimes he would pass there three or four times a day, and sometimes maybe only once a week, then again it would be six or seven times of a night and then he might lay off a week; that this practice has continued for the last 15 or 20 years; during this period he had passed there at night and had called the watchman several times to get the gates up; the gates were mostly down all the time when trains were passing; when he was going home somewhere between 12 and 4 o'clock, sometimes the gates would be down and he would have to call to the gateman to get past; that this was so when no trains were passing.

And thereupon, upon cross-examination, said witness further testified that his store was located south of the tracks and most of his business was north of the tracks; he was in the habit of crossing these tracks all the time; he crossed with a wagon ordinarily in the daytime and with a carriage at night; that when he spoke of the gates being down he spoke from his personal knowledge; in crossing in the daytime he found that they put the gates down when trains came along, and when trains were not coming they would put the gates up; in the night-time the most trouble he had with the gates in getting past was afier 12 o'clock; sometimes they would put the gates down and maybe go to sleep or something like that, and he would have to holler to get the gates up in order to pass by; he would not like to say positively how often this has happened, but he could clearly say that it was about a dozen times; it may have been more, but he could clearly say that it was that often; he had frequently come to these gates at night, both before and
35 after 12 o'clock, when no trains were approaching and found the gates up and crossed without any trouble, and he had done this very much more frequently than he had been stopped by the gates being down; that he could not say exactly whether the gates were more frequently up than down at night when no trains were passing; he had just noticed it about a dozen or fifteen times in passing by when he would come from a ball or something like that; he had noticed the gates down and no trains passing and had

to holler for the gateman; this was generally after 12 and up to 3 or 4 o'clock at night; he had very frequently come there after twelve o'clock and found the gates up, and he had found them that way very often; that there were 3 tracks at this crossing which were used very constantly; the south track, he thought, they did not use at all; when engines and cars and trains were passing backwards and forwards over that crossing, the gates went up and down; these gates were in very frequent use both day and night.

And thereupon said witness, on redirect examination, further testified that when he found the gates down on these occasions he halloaed to the watchman at the crossing; he did not exactly say they were asleep, but he had to halloa to them and wait about 5 or 7 minutes to get past. Thereupon said witness, in response to a question whether passing at night he found the gates more often down or more often up, said, "Well, I found them up, you know, but on a few occasions I found them down—12 or 15 times I recollect."

And thereupon, on recross-examination, said witness further testified that he meant, by the last answer, 12 or 15 times in the last ten years mostly; that he always used the west crossing because it was paved; the east crossing was not paved; that he had never
36 made any inquiry of the watchman to find why he did not answer his hail; on one occasion in the morning about two o'clock witness and Dr. Johnson were detained there about 7 or 8 minutes before they could pass; that he has mostly always found the gateman there when he came along.

FRANK C. KAPPEL testified that he was a brother of the plaintiff, Mrs. Landrigan; that in August, 1898, he was employed at the Penna. R. R. Company's round-house; that Landrigan was employed there as a machinist, and was on the night force; that between 12 and 1 o'clock they were allowed one hour for lunch, and Landrigan was in the habit of taking that hour off; Landrigan had been in the employ of the railroad company for about nine years in this same place and had been living on the north side of Virginia avenue ever since witness first knew him; the night Landrigan was killed was not a clear night nor was it a really dark night—there was no moon and there were a few clouds; that the most usual and direct route to Landrigan's house from the round-house was up South Capitol street to the southwest crossing, then right over to the north side of Virginia avenue; this was the way Landrigan usually took; the round-house was between H & I streets on South Capitol street, about 50 ft. from the building line of South Capitol street. Said witness further testified that he saw where Landrigan was picked up after he was hurt; he was a little west of the southwest crossing, in front of the tool-house; he saw blood around there and a little proud flesh right alongside the south track which is called the ladder track; this blood and flesh was on the south side of the ladder track; he saw it on the morning of the accident
37 about half past four o'clock. Landrigan died at the Emergency hospital a little after four o'clock on the morning of the accident.

And thereupon counsel for the defendant admitted that the plaintiff's intestate died from the injuries received at the time in question.

And thereupon said witness further testified that train No. 78 for New York was scheduled to leave the depot at 11.50 or 11.55.

That the place he noticed this blood, &c., was at the southwest crossing, a little west of the crossing; that the distance from the gates to the southernmost rail of the ladder track at that point is about 15 feet; that the portion of the ladder track lying west of the southeast crossing is used for storing gravel cars and unloading coal; when they unloaded it they shoved it down there alongside of the property yard of the railroad company and put it right over the fence; it was never used for shifting or for making up or breaking up trains or for storing passenger cars; the portion of this track east of the tower was used for shifting cars; this portion west of the tower was hardly used at all—just for storing a couple of cars down there; this tower and the yardmaster's office indicated on the map are the same; in August, 1898, when Landrigan was killed, witness was employed at the Penna. R. R. roundhouse, and had been so employed for about 6½ years, and was familiar with the use of those tracks; on the night Landrigan was killed there were two cars, one containing gravel, west of the southwest crossing; with these two cars standing there on the west end of the ladder track a person could not see anything coming from the west if he were standing immediately
38 outside of the south gate; the only way he could see would be by walking out on the track and looking up and down; that standing outside of the gate the flagman's box at the southwest corner of the southeast crossing and the tower beyond would obstruct the view of the ladder track looking east. Said witness further testified that in August, 1898, he was working in the daytime; that he had worked on the night force, but not during the year 1898; that he had occasion to cross the southwest crossing, at night, immediately prior to and about the time of Landrigan's death; that the gates as a general thing, in the night-time, were down; that during the summer of 1898, and for five or six years previously, he had passed over this crossing three or four times a week at all hours of the night up to 1 o'clock, and that after 11 o'clock he generally found the gates down whether trains were passing or approaching or not; after 11 o'clock the gates were generally kept down whether there was a train in sight or not. Said witness further testified that there was an electric light on the north side of the southeast crossing, about 200 ft. from where Landrigan was killed; he had never noticed whether this electric light furnished any light of any consequence at the intersection of South Capitol street S. W.; that if a train were standing on the north track a few feet from the southwest crossing it would have the effect of making it darker at the gates at the southwest crossing. And thereupon said witness further testified that the ladder track west of the southeast crossing is always rusty, and the track that is used for shifting purposes is always bright.

And thereupon said witness, over the objection of counsel for the defendant, was permitted to testify that he and Landrigan
39 used to go home together for two or three months; that they both worked at night at the time; that the gates were down and that they had to crawl underneath the gates to get home; that the gates were generally kept down and they very seldom ever saw the gates up; that the times when Landrigan and the witness crossed were between 12 and 1 o'clock at night and between 6 and 7 o'clock in the morning.

And thereupon said witness, on cross-examination, testified that he had been in the employ of the railroad company for between six and seven years prior to March 1900, excepting a period of about three months, about three years before Landrigan's death; that he "notices" the rust upon the south track pretty nearly every time he passes there; that he noticed it "this morning;" there are four rails there that are bright, two are rusty, and two others are not so rusty; he has noticed this condition ever since he has been crossing there for the last twenty years; this rust was west of the southwest crossing; he did not remember testifying at the former trial about there being rust on the tracks, because he was not asked the question; counsel asked him about the rust "this morning" for the first time; the south track is pretty well rusted—is rusty all the time; he knows two tracks are bright, and the track fartherest north is not as bright as the middle tracks; that he did not know whether or not the center tracks have steel rails and the north and south tracks iron rails, but did know there was a difference in their weight, the rails of the middle or main tracks being heavier; these tracks are more constantly run over and this tends to keep them bright. Said witness further testified that his mother lived north of the tracks, and that he visited her sometimes two or three times a week after he moved south of the tracks; when Lan-
40 drigan was hurt witness was on the day shift; the time he worked on the night shift was for three or four months in the early stages of his employment by the company, and afterwards for three or four months when he returned to the service of the company and 2½ or 3 years before Landrigan's death; that when he crossed the tracks with Landrigan at night they were coming home to lunch between 12 and 1 o'clock. This was about 3 years prior to Landrigan's death; witness did not cross with him while witness was working in the daytime. Said witness further testified that the western end of the south track was used for storing cars and taking cars in and out for the purposes of the property yard; that he has seen these cars lie there two or three weeks after they were unloaded; that they might have taken the cars out immediately after pushing them in, but he did not see them taken out; the two cars that were on this track when Landrigan was killed had been there for two or three days; that he did not know whether or not these cars had been pulled out and put back during these two or three days, but he noticed the number of one of the cars, and the other car looked like the same

car. Said witness further testified that he calls "shifting" moving cars from one track to another, and what they call a shifting track is generally used every day for shifting; that he has hundreds of times seen cars on that south track and knows they were put in and pulled out, but would not call the process of putting them in and pulling them out "shifting;" that when he testified at the former trial that the shifting is very general down there, he meant that they shifted cars down there to load and unload in the property yard; that this track has only an outlet to the east, but in this respect it is similar to every other track
41 in the yard; the only way in differs from them is that it is about 8 or 10 hundred feet from any switch along there; on the east this track communicates with every other track in the yard by a switch, and, with the exception of the two main tracks, every other track in the yard has a blind end to it. Said witness further testified that during the year prior to Landrigan's death he crossed at this point, at night, after 11 o'clock, on an average of about once a week, or a little oftener; that he usually found the gates down whether trains were in sight or not; he has come there after 12 o'clock at night, when no trains were in sight, and found the gates up, but very seldom; he has found them up only when somebody hallooed to the man to raise them up; that after the traffic of the day was over they would put the gates down and keep them down unless somebody asked to have them raised; this crossing at night is not used as much as in the daytime; most of the shifting and switching is done up towards the eastern section of South Capitol street; that every train that comes from the 9th Street freight station or 6th Street depot, going north, and every freight and passenger train coming from the north would have to cross the South Capitol Street crossing; that the shifting engines also cross there very frequently in the night-time; that engines from the round-house would come out on the ladder track, and then be shifted on the track upon which they were to operate, and all detached engines coming to or going from the round-house pass over the South Capitol Street crossing; that between 12 and 4 or 5 o'clock it is not very busy down there at this crossing. And thereupon said witness admitted having testified at the former trial that he "went around to see his mother once or twice a week, and when he passed going to work sometimes, the gates were up
42 and sometimes down and there was no train in sight;" that he always found the gateman there when he was passing at night; when he got there at night and found the gates down he could not see whether there was a train in sight until he got out on the track and looked up and down; that he has found the gates down at night and walked out on the track and found a train or engines approaching or passing; that the watch-box south of the ladder track interfered with the view down that track to the east—the closer you get, the greater the obstruction from this box and the further away the more view you had of that track; that he thought, standing inside of the gates, the watch-box located outside of the

gates and next to the fence south of the track would prevent a person seeing anything up that track; that you would have to get on the track before you could see up there on account of this watch-box, the fence, and the telegraph pole which were there; that west of the southwest crossing, towards F street, there is a curve; that you could not see around that curve until you got on the north side of the crossing; that although you could not see a train coming from that direction until you crossed the tracks you could hear it unless there were two or three trains passing at the same time, or an engine blowing off steam—then you could not hear anything; that he has crossed over at night and found the gates up and when no trains were coming, but people were passing under, halloaing to the watchman to raise the gates; that the gates were never hoisted all the way—they were on a slant.

And thereupon said witness, on redirect examination, testified that there was no shifting and making up or breaking up of trains on the southwest crossing, on the south track; that this was done
43 east of that crossing, and the only trains that crossed there, freight or passenger, were trains that were already made up; that once in a while a passenger engine comes down from the Jersey yard on the north side of the crossing and switches off onto another track to get a car or something like that. Said witness further testified that they would hoist the gates at night high enough for a man driving a buggy to go under them, and then lower them again; that this south track from the southeast crossing to its western extremity was rusty—you could see it was seldom used.

JAMES MARTIN testified that he lived on South Capitol street about half a mile below the southwest crossing of South Capitol street and the railroad tracks; that he had been born and raised in that vicinity, and had occasion to cross very often this crossing, walking and in vehicles, both in the daytime and night-time; that he always found the gates down at the southwest crossing in the summer of 1898 after 10 or 11 o'clock at night, whether trains were coming or not; that he did not remember a single instance when he found the gates up after 10 or 11 o'clock at night; that he had been driving up and down there once or twice a week since about 1886; at this crossing there are three regular tracks and one shorter track which goes to the property yard or about to the building line of F street; that he has seen a couple of cars standing on the south track west of the southeast crossing, but has never seen them make up trains there.

Thereupon said witness, on cross-examination, further testified that he had seen cars run in on the south track and left there, but had never seen them pulled out; that he had caught cars on
44 this south track near this crossing once or twice a week; the cars that he had seen there contained coal; he had frequently seen them move cars backwards and forwards across the southwest and southeast crossings of South Capitol street; sometimes trains were made up there, and sometimes the trains came up from the

other end; that he mostly approached the gates from the north, after about 9 or 10 or along about 12 o'clock; that he could see very plainly toward the west, coming from the north, but it was almost impossible to see toward the east on account of Pullman cars standing there; the gates were always down, and during the 15 years that he has crossed there he has had to wake up the watchman two or three times probably; on the other occasions when he would come there he would call to the watchman and he would raise the gates if there was no train coming; he thought it was the custom for him to leave the gates down—he thought it was a safeguard; that he did not know any better then and deemed it a proper thing, because of the small amount of use of that crossing at that time of night, to have the gates raised when anybody wanted to go through if no train was approaching; that if there was any doubt as to whether any train was approaching the watchman would always call to the watchman on the other side and ask him if a train was coming; that he regarded these precautions of keeping the gate down at that time of night and of calling to the watchman on the other side to know whether a train was coming or the track was clear as a safeguard and a proper thing to do.

And thereupon said witness, on redirect examination, further testified that sometimes he would catch a passenger train at this crossing, and sometimes he would be there when they were making up passenger trains; that he saw them making up and breaking up trains to the east of the crossing, but they would pull cars over the crossing sometimes when they had a long train; that he believed he had seen trains crossing at that crossing more frequently in the daytime than in the night-time; that he only found the watchman asleep two or three times, and the only difficulty he had in getting him to raise the gates occurred when the watchman was in his box late at night, but always found the gates down.

And thereupon said witness, on recross-examination, further testified that he always found the watchman there; that he very seldom caught the shifting engine there at night; that he thought trains were made up in the daytime because he had never seen much shifting done at night; when he approached the south side of this crossing in the daytime it would be impossible to see towards the west, and very seldom to the east, on account of the watch-box; in the daytime the gates were always up except when a train was passing; when he was coming from the south, going north, he always depended on the gateman to ascertain whether trains were approaching; he could not tell himself in any other way.

And thereupon said witness further testified, in answer to questions propounded by counsel for the plaintiff, that the tool-house and lumber yard west of the crossing would prevent a person approaching the gate from the south from seeing an approaching train from the west; that if there were two cars standing on the south track he would be unable to see a train coming from the west unless he got outside of that track; that it would be harder to see at night than in the day time.

46 Thereupon said witness, in answer to questions propounded by counsel for the defendants, further testified that approaching this crossing from the south, after passing the gate and standing upon the space between the gate and the south track, there was nothing to obstruct the view unless a box car should happen to be standing there to the east; that the watch-box would not obstruct the view; that he meant that when he was driving, before he passed the gates, it might do so, but after getting inside the gates it would not stop your view; that he would go under the gates to get the view.

ELMER E. WILKINSON testified that in the summer of 1898 he resided on South Capitol street, south of the railroad crossing, and had been living there about 11 years; that he usually took the southwest crossing of South Capitol street in going to and from the city; that he had crossed at this crossing for 12 or 15 years, and at night-time, after the usual bed-time, the gates were usually kept down, whether trains were coming or not; he often had to ask the man to hoist the gates, and sometimes would have to wake him up; that he crossed there at night once or twice or three times a week; that he would not like to say any instance when he found the gates up at night; that he was somewhat familiar with the use of the tracks at that point; that the end of the south track is generally used to stack cars.

And thereupon said witness, on cross-examination, further testified that he had seen cars stacked in there most always when he would pass there; that he can only recall seeing them move cars in there on one occasion; that he judged they moved the cars in and pulled them out on this track; he never noticed the condition of the rails of the south track as to whether they were rusty or bright;

47 he never noticed anything unusual in the appearance of the rails of that track; they looked about the same as the other rails, so far as he noticed; that if they had been more rusty than the other rails he does not know that he would have noticed it; all of the rails looked pretty generally alike; that he would approach the gates from the south any time from half past six or seven o'clock on, and usually found the gates down; sometimes there would be two or three teams waiting there; sometimes you might find trains passing or that they had just passed, and they would then let you through, or maybe they would hold you there until another engine would pass down; that generally he would not stay there, but would go through and take whatever risk attached to it; that he always got through before the engine would even get in sight; that he had gone under the gates and over the crossing when cars or engines were approaching; that when he returned in the neighborhood of ten or twelve o'clock at night he would generally find the gates down; that he could not say that he has ever come down there and found the gates up when no trains, cars, or engines were moving in that vicinity; that when he found the gates down he would just go under the gate and go on through without calling to the watchman to raise the gate.

JOHN G. OESER testified that in 1897 and 1898, and along there, he lived on South Capitol street south of the railroad tracks, and had occasion to pass the southwest crossing sometimes two or three times at night; that he generally crossed this crossing fifteen or sixteen times each week, night and day, in going to his business at the K Street market; that he has crossed there at all hours of
48 the night, from 9 until 1 o'clock at night; that during the years 1897 and 1898 the gates after bed-time were kept down all the time; that he never saw the gates up after bed-time except when some one would ask to have them raised; that the end of the south track west of the southeast crossing of South Capitol street was generally used for coal cars; that they made up and broke up trains to the east, up at New Jersey avenue; that he has never seen them making up and breaking up trains as far west as the southwest crossing of South Capitol street; freight trains are made up at Benning's, east of the tunnel.

And thereupon, on cross-examination, said witness further testified that after 9 o'clock at night he would very often catch trains at the crossing, they generally made a practice of standing right there or of moving up and down upon that crossing; that sometimes there would be no trains there and at other times there would be two or three trains, one right after the other; that on four different occasions during the eleven years that he lived down there he has been there and — to wake the watchman up in order to get him to raise the gates; the tracks at this crossing were in very frequent use; cars, trains, and engines were crossing up and down those tracks pretty much all the time; that the crossings down there are dangerous; they would not be so dangerous if the watchman would only attend to their business at South Capitol street; that the southernmost track is always filled with coal cars, and a person coming from the south could not see any train approaching from the west until they got on the north-bound track; that the crossing would not be dangerous if the man there attended to his business and did not sleep all night; that sometimes when cars were coupled right they would come down on you; that he had seen them
49 go through there and smash cars several times.

And thereupon, on redirect examination, said witness further testified that during the years 1897, 1898, and 1899 he crossed there at all hours from six or seven until twelve o'clock at night and three o'clock in the morning; that sometimes he would find a train there and sometimes he would not, but would always find the gates down.

And thereupon, on recross-examination, said witness further testified that he had known cars to be smashed up there once or twice by going all the way across this crossing.

Thereupon it was agreed by and between counsel that the track on which the accident occurred belonged to the Baltimore & Potomac Railroad Company, but was operated at the time of the accident by the Philadelphia, Wilmington & Baltimore Railroad Company.

WILLIAM R. MILLER testified that he was engaged in the lumber business at the corner of South Capitol and G streets southwest; that there was a small strip of land between the railroad track and their yard; that he was conducting this business at that point from 1897 until 1899; that the south track west of the southeast crossing of South Capitol street he has always considered as a storage yard running from New Jersey avenue parallel to the property yard; that he has never known them to make up a train there; the trains are made up further east—east of the southeast crossing; that standing outside of and south of the gates of this crossing you could not see any great distance in either direction; by stepping out further under the gates you could see further down the tracks.

50 And thereupon said witness, on cross-examination, further testified that by going out on the first track you could get a very good view in both directions—probably further to the east than to the west; that if the west end of the track were occupied by cars a person could not see any distance at all, and you would have to go past the cars that might be standing on that track; that if you passed under the gate and were standing on the open space between the inside of the gate and the south rail of the southernmost track you could see to the east a distance of about 100 feet or more; that he did not know anything about the use of the crossing in the night-time; that by storage track he meant that very frequently cars containing railroad supplies stood there for a number of days without being unloaded; that he never knew a car to be put in there except for the company's purposes; that he has often seen cars pushed in and pulled out of there over the southwest crossing of South Capitol street.

And thereupon, on redirect examination, said witness further testified that they stored passenger coaches east of the southeast crossing of South Capitol street where they make up their passenger trains.

HENRY E. TRIPP testified that he had lived all his life about 200 feet from the southwest crossing of South Capitol street and Virginia avenue; that he was engaged in the business of a carriage and wagon builder, and that his place of business commanded a view of the South Capitol Street crossing; that the south track, known as the ladder track, west of the southeast crossing was not used for anything but storage, as far as he knew; that he does not think they could use it for making up and breaking up trains, because

51 it does not run over 200 or 250 feet from the southwest crossing; that they stored their passenger cars in the Jersey yards where they make up trains, also on the north track on Virginia avenue to the east of the southeast crossing, where they make up trains; that the western end of the south track was used mostly for the storage of coal, as he supposed, for the use of the railroad company; that in the summer of 1898, including the month of August, the gates at this crossing after the usual bed-time were

mostly kept down; that he has seen them down at 9 o'clock, and presumes that they were kept down all night; every time he saw them they were down, whether trains were passing or not.

And thereupon, on cross-examination, said witness further testified that his house faced the railroad tracks; that when people approached the crossing at night and wanted to cross, if they were walking, they would generally stoop under the gates and walk across; if driving they would have to holler to the watchman to raise the gates; that he has seen this along in the summer of 1898; that they would be up at times, but always down when trains were passing.

C. FRANCIS JENKINS testified that he had been a locomotive fireman, and had frequently shifted cars to make up trains, including Pullman cars and passenger coaches; that a Pullman car running slowly, as fast as a man would ordinarily run, on a straight track, would make practically no noise at all; very much less noise than an ordinary passenger car; that they were built purposely for that object; they are very much heavier than passenger coaches and more staunchly built; they are built with a longer truck and wheel base and softer springs. Said witness further testified that the light in the vestibule of a Pullman car is so located as to illuminate the platform only; that is the purpose of that light; that it does not throw the light more than a couple of feet beyond the end
52 of the bumper of the car; it is not intended to illuminate the track.

And thereupon, on cross-examination, said witness further testified that such a light was not intended for a locomotive headlight; that if a man was standing on the track some distance from the advancing end of a car showing such a light he would not see the source of the light, but would see the reflected light on the platform on the car; he could see the illuminated end of the car; that if he was not looking exactly in that direction this light would not attract his attention away from something else; that if he were looking up the track he could see the light if he were not too far away.

JOHN T. WEBSTER, recalled, further testified that he had noticed the movement of passenger coaches and Pullman cars which were being shifted backwards and forwards in the railroad yards a great many times; that a Pullman car running along an ordinarily straight track at a rate of speed a little faster than a man ordinarily runs or can run does not make any noise; that he had experienced it often; that he had seen them shifted in front of his house and they would not make any noise going at an ordinary speed unless an engine were connected with them; that a Pullman car makes less noise than an ordinary coach.

And thereupon, on cross-examination, said witness further testified that he did not say when last on the stand that they did not shift cars west of the South Capitol Street crossing; that he meant to say

they shifted on the east end a great deal more than they did
53 on the west; they did most of the shifting at the east end; that they would often want to get a certain car off the siding and would run a Pullman car or a common ordinary coach down along the north track past his house and past the F Street crossing; that this was a common thing; they did it often; the shifting of cars on that north track in front of his house to the west of the South Capitol Street crossing was done frequently; that a Pullman car or an ordinary coach would make considerable noise in bumping over the end of a switch.

And thereupon the plaintiff, CATHARINE LANDRIGAN, further to maintain the issues upon her part joined, testified that she was 27 years of age, and was the widow of Thomas J. Landrigan, to whom she was married on February 18th, 1892; said Landrigan died August 29th, 1898; that at the time of his death he was on the night force at the Pennsylvania Railroad round-house; he was employed there as machinist and assistant boss; he had been on the night force for about eight years; that their home was north of the railroad tracks on Virginia avenue; that said Landrigan in going from his house to the round-house crossed the railroad tracks at the southwest crossing of South Capitol street and Virginia avenue; that his hours of work were from 7 in the evening until 6 in the morning, with an hour off from 12 to 1 o'clock for lunch; that sometimes he would come home a little before 12 and sometimes a few minutes after 12; that he received on an average $65 a month; at the time of his death he was 32 years of age; that they had no children; that out of his salary he contributed to the support of the witness from $53 to $58 a month; that this sum of $58 was for the household expenses generally. Said witness further testified that
54 about two weeks after her husband's death she viewed the spot where the accident happened, and noticed that the rails of the south track at that point were rusty; that this rust extended from the end of that track to the southeast crossing; that east of the southeast crossing the tracks were brighter; that the two center tracks at the southwest crossing were very bright, but the track on the north was not quite so bright as the center tracks; that she has seen cars loaded with coal and railroad ties standing at times on the south track west of the southeast crossing; that this portion of the track was not used for switching purposes. Said witness further testified that the night her husband was killed was dark and cloudy.

And thereupon the plaintiff, further to maintain the issues upon her part joined, gave in evidence an extract from the American tables of mortality, showing the probable duration of life of Mr. Landrigan at the age of 32, and of Mrs. Landrigan at the age of 26, to wit:

Mrs. Landrigan; age, 26; community life, 39.11; probable individual life, 69.

Mr. Landrigan; age, 32; community life, 33.92; probable individual life, 63.

And thereupon counsel for the defendants, upon the foregoing, which was all the evidence offered or produced in the case, moved the court to instruct the jury to return a verdict for said defendants; but the court overruled said motion; to which ruling of the court the defendants, by their counsel, then and there duly excepted, and said exception was noted at the time upon the minutes of the court.

55 And thereupon, upon all the evidence hereinbefore set forth, which is hereby referred to and made a part hereof, the plaintiff, by her counsel, prayed the court to instruct the jury as follows, which the court accordingly did:

"2. The jury are instructed that if they believe from the evidence that the gates at the crossing where the deceased received his injury, were generally kept down at night from 10.30 or 11 o'clock until the early morning, without regard to the approach or presence of a car, a train, or trains or locomotives, and shall further conclude from all the facts and circumstances of the case that the deceased had knowledge of that fact, then the circumstance that the gates at the intersection of South Capitol street were down at the time of the accident was not of itself a warning to him of the presence of danger, and contributory negligence cannot be imputed to him from that fact alone."

"3. While knowledge by the deceased of the presence of the Fenton engine on the north track or partly upon the South Capitol Street crossing and the approach of No. 78 upon one of the central tracks at or near the time of the accident might or would indicate the presence of danger on or near those tracks, it is for the jury to determine upon all the facts of this case whether it was a want of ordinary or reasonable care and prudence upon his part to be upon the south track, at the point upon said last-named track at which they shall find from the evidence the accident occurred."

56 "4. The degree of care that was proper care on part of the deceased and defendant must fit and grow out of the time, the occasion and circumstances. The care to be exercised is such as an ordinarily prudent man would exercise under the circumstances developed by the evidence in this case. This is the true rule whether applied to the negligence of the railroad company or to the alleged contributory negligence of the deceased, and what is due care under the circumstances of this case must be determined by the jury by applying the rule as to what in their judgment a man of ordinary prudence would have done under the circumstances shown by the evidence."

And thereupon the court voluntarily gave the following substitutes for the first, fifth, and sixth prayers offered by the plaintiff:

("*Substitute for Nos.* 1 & 6.)

In the absence of all evidence tending to show whether the plaintiff's intestate stopped and looked and listened before attempting to cross the said south track, the presumption would be that he

did. But that presumption may be rebutted by circumstantial evidence, and it is a question for the jury whether the facts and circumstances proved in this case do rebut that presumption, and if they find that they do they should find that he did not so stop and look and listen, but if the facts and circumstances fail to rebut such presumption then the jury should find that he did so stop and look and listen. In order to justify them in finding that he did not all the evidence tending to show that should be weightier in the minds of the jury than that tending to show the contrary."

("*Substitute for No.* 5.)

57 The burden of proving that the accident to the plaintiff's intestate occurred through his contributory negligence is upon the defendant. But it may rely upon any evidence introduced by the plaintiff tending to show such contributory negligence, if any there be. But in order to justify the jury in finding contributory negligence, all the evidence tending to establish it should be weightier in their minds than all tending to negative it."

"That in considering and determining the question of alleged contributory negligence of deceased, the character of the track upon which deceased was (if the jury shall find that he was upon one of the tracks of the defendant *was so* at the time he was hurt), the purpose for which said track was used, the extent of its use and all the facts and circumstances surrounding the injury that caused deceased'- death should be taken into consideration in deciding whether or not deceased was guilty of contributory negligence or not."

To the granting of which prayers and each of them the defendants, by their counsel, interposed and objected; but the court overruled said objections, and said prayers were given to the jury; to which ruling of the court the defendants, by their counsel, then and there separately and severally excepted, and said exceptions were noted at the time upon the minutes of the court.

And thereupon the defendants, by their counsel, prayed the court to instruct the jury as follows:

"1. If the jury shall find from the evidence that at the time the plaintiff's intestate approached the crossing in question the safety gates were closed or lowered and that said intestate went under said gates and stood upon or near enough to the south or 'ladder'
58 track at or near the said crossing to be struck by a passing car and that while so standing upon or near said track he was struck by a car moving upon said track and received the injuries which resulted in his death, then the plaintiff's intestate was guilty of contributory negligence and the verdict must be for the defendant."

"2. If the jury shall find from the evidence that at the time the plaintiff's intestate approached the crossing in question the safety gates were closed or lowered, then they are instructed that the gates so closed or lowered were a warning to all persons approaching said crossing that cars, engines or trains might be expected to pass over and upon all or any of the railroad tracks at said crossing

while the gates remained so closed or lowered, and if the jury shall further find from the evidence that the plaintiff's intestate did not heed such warning but went under the closed gates and was struck by a car moving upon one of the defendant's tracks at said crossing and thereby received the injuries which resulted in his death, the plaintiff cannot recover in this action and the verdict must be for the defendant."

"3. If the jury shall find from the evidence that at the crossing in question and on the occasion complained of the defendant maintained four (4) tracks, the most northerly of which was used for the passage of freight trains and for shifting purposes, the most *southerly, commonly called the* 'ladder' track, being used for shifting trains and storage purposes, and the two intermediate tracks for the general business of the company, and that the
59 defendants also maintained at said crossing safety gates operated by a gateman and at the time the plaintiff's intestate approached said crossing on the night of the accident these gates were closed or lowered and a freight or mixed train, with an engine attached, was standing upon the most northerly track on said crossing, and a shifting engine with a train of cars was operating upon said southerly or 'ladder' track in the railroad yards immediately east of said crossing and a regular express train was about due at said crossing, then the jury is instructed that said gates were closed or lowered for all trains, cars, or engines which were moving or passing or which might move or pass upon all or any of said tracks at said crossing and were a warning of danger which the plaintiff's intestate was bound to heed, and if the jury shall find that the plaintiff's intestate met his death by going under said gates and upon or so near to one of said tracks as to be struck by a car moving on said track he was guilty of negligence contributing to the accident, and the plaintiff cannot recover in this action."

"4. It was the duty of the plaintiff's intestate before he attempted to go upon any one of the railroad tracks of the defendant at the time and place in question to look both up and down such tracks for approaching cars, engines and trains and also to listen for such cars, engines and trains, and the burden of proof rests upon the plaintiff to satisfy the jury by competent evidence that the deceased did so look and listen and that he was free from any fault, which contributed to the accident. The charge of negligence against the defendant is the foundation of this action and the plaintiff is bound to satisfy the jury by a fair preponderance of the evi-
60 dence that the injury to the deceased was occasioned solely by the negligence of the defendant, otherwise the defendant is entitled to the verdict."

"5. The jury are further instructed that there is no presumption of law that the plaintiff's intestate did so look and listen before going upon or dangerously near to the tracks at the crossing and on the occasion in question, but on the contrary the law requires that this precaution on the part of the plaintiff's intestate shall be fully established to the satisfaction of the jury by a fair preponder-

ance of the evidence in the case, and the jury are instructed that there is no evidence in the case from which they can find that said intestate did so look and listen."

"6. The jury are instructed that no evidence has been submitted in this case upon which they would be justified in finding the existence of any usage or custom to keep the crossing gates at the crossing in question lowered from 10.30 or 11 o'clock in the evening until an early hour in the morning irrespective of the passage of trains, cars, or engines."

"11. It appearing from the uncontradicted evidence in the case that the defendants maintained at all hours of the night a gateman in charge of the gates at the crossing in question who raised and lowered said gates as occasion might require, and it further appearing from such evidence that such gateman was accustomed to open or raise said gates for the passage of pedestrians or vehicles when it was safe to do so, and it further appearing that the crossing in question being adjacent to the shifting, storage and engine yards of said defendants and between such yards and their passenger and
61 freight stations in the city of Washington and that the main tracks leading to and from said stations also passed over the same said crossing was an especially dangerous place, the jury are instructed that in the absence of any evidence tending to show that the plaintiff's intestate, upon approaching said crossing and finding the gates between him and the tracks lowered or closed, made any request of the gateman to raise or open the same or submitted any inquiry as to whether any engines, cars or trains were approaching said crossing before he went under said gates and entered upon the crossing within the same and thereby received the injuries which resulted in his death, said intestate was guilty of negligence directly contributing to his own misfortune and the plaintiff cannot recover."

But the court refused to grant each and all of said prayers so offered by counsel for the defendants, and to such refusal of the court to grant each of said prayers counsel for the defendants then and there separately and severally excepted, and such exceptions were noted at the time upon the minutes of the court.

And thereupon the court voluntarily and of its own motion instructed the jury as follows:

"The COURT: Gentlemen of the jury: The declaration in this case avers that the plaintiff, Catharine Landrigan, was duly appointed administratrix of Thomas J. Landrigan, and that the plaintiff sues the defendants, The Baltimore and Potomac Railroad Company and The Philadelphia, Wilmington and Baltimore Railroad Company, bodies corporate, having officers and agents doing business in the District of Columbia, for that the said defendants, here-
62 tofore, to wit, on the 29th day of August, 1898, and for a long time prior thereto, the defendant, The Baltimore and Potomac Railroad Company, owned, managed, and controlled a certain railroad, operated by steam, together with tracks, cars, and locomotive engines; that the said railroad tracks were and are located on cer-

tain streets and avenues in the city of Washington, District of Columbia, and intersect and cross certain others; that, among others, said tracks were and are located upon and along what is known as Virginia avenue southwest, and intersect and cross what is known as South Capitol street; that the defendant, The Philadelphia, Wilmington and Baltimore Railroad Company, also was and is accustomed to operate and use under lease, license, or permission from the defendant, The Baltimore and Potomac Railroad Company, sundry of said tracks, including that on Virginia avenue southwest, at its said intersection with said South Capitol street; and it then and there became and was the duty of the said defendants to guard and protect the public from all trains and engines propelled upon said tracks, and properly and securely to fasten and couple together, and properly and securely to furnish and equip their said cars with safe and efficient brakes, and to give timely warning and notice of the approach of all engines and cars upon said tracks to all persons desiring to cross said tracks at the intersection of the aforesaid street and avenue; and it then and there became and was the duty of the defendants to keep a diligent and careful lookout upon all moving cars and engines for persons crossing said tracks and to have and to keep lights on the end of their said cars when being propelled or moved along said tracks after dark.

63 Yet, the defendants, on to wit: the 29th day of August, 1898, disregarding their duty in the premises, so carelessly, negligently, and improperly conducted themselves in this behalf that at the time and place aforesaid Thomas J. Landrigan, plaintiff's intestate, while attempting to cross said Virginia avenue southwest, at its said intersection with said South Capitol street upon the public highway in said city, as he had a right to do, was through the carelessness, negligence, and improper conduct of the defendants thrown down and run over by a car or cars operated as aforesaid and running backwards upon one of the said tracks operated as aforesaid by the defendants, said cars or cars being then under the management and control of the defendants' agents, servants, and employees; that the defendants by their agents, servants, and employees were on, to wit: on the day and year last aforesaid, at a late hour at night, shifting, or causing to be shifted, certain cars, and so negligently, carelessly, and improperly coupled together, their said cars, and so negligently, carelessly, and improperly failed to furnish and equip said cars with safe and efficient brakes, and so negligently and carelessly and improperly failed to give any proper notice or warning of the movement of said cars, by having and keeping a light or lights upon the ends of said cars, or by the ringing of bells, or blowing of whistles, or by giving other signs, notices or warnings, that the said Thomas J. Landrigan while in the act of crossing said railroad tracks, as he had a right to do, and without any want of due or reasonable care on his part, was thrown down and run over and killed by one of said cars, being shifted as aforesaid, breaking loose and running

back upon him without any notice or warning of the ap-
64 proach of said car, so running backward upon the said Landrigan, as aforesaid; that the said Landrigan, had he not been killed by the said wrongful act, neglect, and default of the said defendants' agents, servants, and employees, as aforesaid, could have maintained an action and have recovered damages for the said wrongful act, neglect, and default as aforesaid; that the plaintiff's intestate left him surviving a widow, a mother, a brother, and a sister, and by reason of the premises and the statute in such case made and provided an action for damages hath accrued to the said plaintiff, to wit: in the sum of ten thousand ($10,000) dollars, therefore the plaintiff sues. And the plaintiff claims of the said defendants the sum of ten thousand ($10,000) dollars, besides costs of this action.

To this (action) declaration the defendants have pleaded the general issue, not guilty. It becomes the duty of the plaintiff, upon this trial, to prove by a preponderance of the evidence the averments substantially as laid in this declaration. That is, the facts as stated in the declaration are to be substantially proven by the plaintiff by a preponderance of the evidence before the*m* can claim a verdict at your hands. The right to recover in this action is based upon the alleged negligence of the railroad companies. In order to find a verdict for the plaintiff, you must find that the railroad company was guilty of negligence, that that negligence resulted in the death of the plaintiff's intestate, and that there was no negligence upon the part of the plaintiff's intestate which directly caused, contributed to his death. The question of whether either the defendant or the plaintiff's intestate was guilty of negligence that caused the death is a question of fact for you.
65 The law can only define to you what negligence is, and then you must take the facts you have and fit them into that definition, and see whether the defendant was guilty of negligence; and then, if you find that the defendant was guilty of negligence, fit the facts into that definition for the purpose of determining whether the plaintiff's intestate was also guilty of negligence. If you find both the plaintiff and the defendant's intestate to be guilty of negligence, then you must find for the defendant, for the reason that if the defendant be guilty of negligence, and yet the plaintiff's intestate was also guilty of negligence, the representative of the deceased man who was injured, whose death came by this accident, cannot recover for the loss.

The instruction given which defines negligence I read that to you now as a definition of negligence. That is, when you are inquiring whether the defendant was guilty of negligence, or whether the plaintiff's intestate was guilty of negligence, you apply this definition to the facts so presented. "The degree of care that was proper care on the part of the deceased and defendant must fit and grow out of the time, the occasion and circumstances. The care to be exercised is such that an ordinary person would exercise under the circumstances developed by the evidence in this case. This is the

true rule whether applied to the negligence of the railroad Co. or to the alleged contributory negligence of the deceased, and what is due care under circumstances of this case must be determined by the jury by applying the rule as to what in their judgment a man of ordinary prudence would have done under the circumstances shown by the evidence."

66 It is not a question of what an ordinarily prudent man would have done generally, but it is what an ordinarily prudent man would have done under the particular circumstances and facts of the particular case. What would be ordinary care under some circumstances would be gross negligence under others; so that when you are testing a man's conduct for the purpose of ascertaining whether he has used ordinary care, and therefore has not been guilty of negligence, or whether he has failed to use ordinary care and has therefore been guilty of negligence, you are to test his conduct by the particular facts and situation in which he is placed at the time the question arises.

The first question is, was the defendant railroad company guilty of negligence? The plaintiff claims that it was in three particulars: in coupling the cars, in having a car that had brakes out of order, and in not having sufficient light.

You first determine how the coupling was made, and then you ask yourselves the question, after you have determined how it was made, whether that was what a reasonably prudent man, doing that kind of a piece of business under the circumstances, would have done. If so, the railroad company's employees would not have been guilty of negligence in doing what they did do. If you reach the conclusion under all the circumstances of the case that a reasonably prudent man doing that thing would have done it in that way; but, if you reach the conclusion that a reasonably prudent man doing that thing under the circumstances in which those men were called upon to do it *it* would not have done it in that way, then the railroad company through its employees who did it was guilty of negligence in doing it in that way.

67 So you see, whether the railroad company was guilty of negligence or not in that particular is a question of fact for you, and you are to test it not by this definition alone that I have given you, but by that definition considered in connection with the particular facts and surrounding circumstances under which that act was done.

(The clerk at this point, counsel for both the plaintiff and the defendants consenting, read the following instructions which the court had granted:)

Plaintiff's 2nd Prayer.

"The jury are instructed that if they believe from the evidence that the gates at the crossing where the deceased received his injury, were generally kept down at night from 10.30 or 11 o'clock until the early morning, without regard to the approach or presence of a car, a train, or trains or locomotives, and shall further con-

clude from all the facts and circumstances of the case that the deceased had knowledge of that fact, then the circumstances that the gates at the intersection of South Capitol street were down at the time of the accident was not of itself a warning to him of the presence of danger, and contributory negligence cannot be imputed to him from that fact alone."

Plaintiff's 3rd Prayer.

"While knowledge by the deceased of the presence of the Fenton engine on the north track upon of partly upon the South Capitol Street crossing and the approach of No. 78 upon one of the central tracks at or near the time of the accident might or would indicate the presence of danger on or near those tracks, it is for the jury to determine upon all the facts of this case whether it was a want of ordinary or reasonable care and prudence upon his part to be upon the south track, at the point upon said last-named track at
68 which they shall find from the evidence the accident occurred."

Plaintiff's 4th Prayer.

"The degree of care that was proper care on the part of the deceased and defendant must fit and grow out of the time, the occasion and circumstances. The care to be exercised is such as an ordinarily prudent man would exercise under the circumstances developed by the evidence in this case. This is the true rule whether applied to the negligence of the railroad company or to the alleged contributory negligence of the deceased, and what is due care under the circumstances of this case must be determined by the jury by applying the rule as to what in their judgment a man of ordinary prudence would have done under the circumstances shown by the evidence."

Substitute for Plaintiff's 1st & 6th Prayers.

"In the absence of all evidence tending to show whether the plaintiff's intestate stopped and looked and listened before attempting to cross the said south track, the presumption would be that he did. But that presumption may be rebutted by circumstantial evidence, and it is a question for the jury whether the facts and circumstances proved in this case do rebut that presumption, and if they find they do they should find that he did not so stop and look and listen, but if the facts and circumstances fail to rebut such presumption, then the jury should find that he did so stop and look and listen. In order to justify them in finding that he did not, all the evidence tending to show that should be weightier in the minds of the jury than that tending to show the contrary."

Substitute for Plaintiff's 5th Prayer.

"The burden of proving that the accident to the plaintiff's
69 intestate occurred through his contributory negligence is upon the defendant. But it may rely upon any evidence introduced by the plaintiff tending to show such contributory negligence, if any there be. But in order to justify the jury in finding contributory negligence, all the evidence tending to establish it should be weightier in their minds than all tending to negative it."

Plaintiff's 6 7th Prayer.

"That in considering and determining the question of alleged contributory negligence of deceased, the character of the track upon which deceased was (if the jury shall find that he was upon one of the tracks of defendant, and was so at the time he was hurt), the purpose for which said track was used, the extent of its use and all the facts and circumstances surrounding the injury that caused deceased's death, should be taken into consideration in deciding whether or not deceased was guilty of contributory negligence or not."

The court, through the clerk, thereupon read the following prayers, granted on behalf of the defendants:

Defendants' 7th Prayer.

"The jury are instructed that there is no evidence in this case from which they would be justified in finding that the lead or ladder track at the point near which the plaintiff's intestate was injured was an unused track, but on the contrary, as the undisputed evidence shows said track was used at irregular intervals, more or less, and such use made it incumbent upon the plaintiff's intestate to exercise due care and caution, under all the circumstances, before attempting to cross the same, and if the jury shall find that plaintiff's intestate did not use such due care and caution and
70 did not look and listen with *in*tention for any train or car that might be approaching on said track, and that his failure so to do contributed to his injury, then their verdict should be for the defendant."

Defendants' 8th Prayer.

"The jury are instructed that unless they are satisfied from the evidence that the plaintiff's intestate was injured by being struck and run over by the Pullman car which was moving on the south or 'ladder' track at the crossing and on the occasion in question, then their verdict should be for the defendant."

Defendants' 9th Prayer.

"Before the jury can find for the plaintiff they must be satisfied by a fair preponderance of the evidence that the defendant was guilty of negligence directly responsible for the accident."

Defendants' 10th Prayer.

"If the jury shall find for the plaintiff then the measure of damages will be the pecuniary loss sustained or which may be sustained by the widow of the deceased by reason of his death; but the burden of proof rests upon the plaintiff to satisfy the jury by evidence that said widow, by reason of said death, sustained or will sustain pecuniary loss, and the extent thereof.

And, in estimating such damages, the jury are limited to the consideration of pecuniary loss solely, and nothing can be estimated or allowed for shock, grief, or mental suffering of the deceased or of his widow, and nothing can be estimated or allowed for the loss to the widow of the society of the deceased, and nothing can be estimated or allowed for punitive or exemplary damages or smart money against the defendant because it is a railroad company and one of its cars or trains caused the death of the plaintiff's
71 intestate."

The COURT: "So far as I can discover, all of the points in issue between counsel are embraced in the instructions that have been given. You have heard, gentlemen, from counsel, that should you, after your deliberations, find that the plaintiff is entitled to a verdict, that the parties have agreed upon what the amount of that verdict shall be; and, accordingly, if you find for the plaintiff, you will find in the sum of $6,500. If you find for the defendant, your verdict will simply be, for the defendant. Whether you find for the defendant or for the plaintiff, your duty in that respect has been embraced within the prayers which have been read to you by the clerk, which have been adopted and sanctioned by the court. You will follow those instructions as your guide in the performance of your duty when you retire. You may retire, gentlemen."

Mr. FLANNERY: We renew our exceptions to the refusal of our prayers, and to the granting of those of the plaintiff.

Be it further remembered that each of the separate and several exceptions taken by counsel for the defendants, as hereinbefore set forth, was so taken by counsel for the defendants then and there before the jury retired, and each of said exceptions was then and there separately and severally duly entered upon the minutes of the justice presiding at the trial, and counsel for said defendants then and there prayed the court, and now prays the court, to sign and seal this bill of exceptions, and at the request of counsel for said

defendants the same is accordingly signed and sealed and
72 made a part of the record in this case this 27th day of December, A. D. 1901.

E. F. BINGHAM,
Chief Justice Supreme Court, D. C. [SEAL.]

Settled by counsel this 27th day of December, 1901.

DOUGLASS & DOUGLASS,
JOSEPH D. WRIGHT,
Attorneys for Plaintiff.
F. D. McKENNEY,
J. S. FLANNERY,
Attorneys for Defendants.

73 UNITED STATES OF AMERICA, } ss:
District of Columbia, }

Supreme Court of the District of Columbia.

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 72, inclusive, to be a true and correct transcript of the record, as prescribed by rule 5 of the Court of Appeals of the District of Columbia, in cause No. 42828, at law, wherein Catharine Landrigan, administratrix of the estate of Thomas J. Landrigan, deceased, is plaintiff and The Baltimore & Potomac Railroad Company *et al.* are defendants, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 14th day of January, A. D. 1902.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1168. The Baltimore & Potomac Railroad Company *et al.*, appellants, *vs.* Catherine Landrigan, administratrix, &c. Court of Appeals, District of Columbia. Filed Jan. 14, 1902. Robert Willett, clerk.

FRIDAY, *April 11th, A. D.* 1902.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY and The Philadelphia, Wilmington and Baltimore Railroad Company, Appellants,
vs.
CATHARINE LANDRIGAN, Administratrix of the Estate of Thomas J. Landrigan, Deceased. } No. 1168.

The argument in the above entitled cause was commenced by Mr. F. D. McKenney attorney for the appellants, and was continued by Mr. J. J. Darlington attorney for the appellee.

TUESDAY, *April 15th, A. D.* 1902.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY and The Philadelphia, Wilmington and Baltimore Railroad Company, Appellants,
vs.
CATHARINE LANDRIGAN, Administratrix of the Estate of Thomas J. Landrigan, Deceased. } No. 1168.

The argument in the above entitled cause was continued by Mr. Charles A. Douglass, attorney for the appellee, and was concluded by Mr. J. S. Flannery, attorney for the appellants.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY and The Philadelphia, Wilmington and Baltimore Railroad Company, Appellants,
vs.
CATHARINE LANDRIGAN, Administratrix of the Estate of Thomas J. Landrigan, Deceased. } No. 1168.

(Mr. Justice SHEPARD delivered the opinion of the court.)

This is an appeal from a judgment for the sum of $6500 recovered of the appellant by the appellee, in an action of damages for the negligent killing of her husband, of whose estate she is the administratrix.

As the case turns upon the sufficiency of the evidence to warrant its submission to the jury, a full statement of the same is made necessary.

About midnight on August 29, 1898, the intestate, Thomas J. Landrigan, was found near one of the tracks of the Baltimore and Potomac Railroad Company in the city of Washington at the intersection of South Capitol street. He had been run over by a car or cars on one of said tracks and so badly injured that he died about 4 o'clock in the morning.

He was thirty two years old, and had a wife but no children. He had been in the employ of the railroad company for about eight years in its round house in Washington, as a machinist. He was an assistant boss of the night force with an average wage of $65. per

month. His hours of work were from 7 p. m. until 6 a. m., with an hour for lunch between twelve and one o'clock. His habit had been to go home for lunch sometimes starting a little before twelve o'clock and sometimes a little later. His nearest route led across the tracks at South Capitol street. There was testimony tending to show that the night of the accident was a dark and cloudy one. Intestate furnished from $53 to $58 per month to his wife for her support and for household expenses. His wife was twenty six years old. The American mortality tables were introduced to show the probable duration of life of husband and wife based on their respective ages at the time of his death.

Other evidence introduced on the part of the plaintiff as tending to show that the death of Thomas J. Landrigan was caused by the negligence of the defendant is recited in the bill of exceptions as follows:

"CHARLES J. MOTLEY testified that he resided at # 318 Third street southeast, Washington, D. C., and had been in the employ of the Philadelphia, Wilmington & Baltimore Railroad Company for nine years; in August, 1898, he was employed by said railroad company as flagman and extra conductor engaged in the shifting operations around the "Jersey yards" of said company; on the night Landrigan was killed he was acting as conductor and was engaged in making up trains; the "Jersey yards" extended from South Capitol street east to New Jersey avenue; the engine yard or round-house yard is also a part of what is called the "Jersey yard;" the round-house is on South Capitol street, south of the South Capitol Street crossing; at this crossing there are four tracks, the farthest to the north next to the Government reservation, being used for shifting purposes, the two tracks immediately south of it being the north and south bound main tracks, and the most southerly track being what is called the "lead" or "ladder" track; this "ladder" track was used for shifting purposes, for shifting out cars; all the tracks in the "Jersey yard" lead into the "ladder" track; said "ladder" track, from one end of it to the other, runs all the way from F street southwest to I street southeast and crosses South Capitol street; on the night of the accident to Landrigan witness was the yard conductor engaged in making up a train of tourist or passenger cars to go south; he had pulled eight or nine cars out on the "ladder" track, and while these cars were standing upon the "ladder" track the last car broke away, ran down the "ladder" track, which is an ordinary downgrade from the point where the car broke away, towards South Capitol street; at the time the coach broke away it was coming out on the "ladder" track, and the break occurred at a point leading into a switch at a little curve; this coach had been taken from one of the storage tracks and had been brought out on the "ladder" track; witness coupled the coach himself with the assistance of Brakeman Wilhoit and Mr. Hottal, the yardmaster, who was there to give him the signal; the car that broke away was a Pullman, and the car to which it had been coupled was a tourist

car; the Pullman had a Janney coupler, and there was a Miller coupler on the tourist car; the Miller and Janney couplers would not couple—they were not made or intended to couple together; one was a little higher than the other, the Janney being the higher of the two, but do not remember whether or not one went over the other; one of the drawheads also was higher than the other; it was a very difficult coupling to make, and a link and pins had to be used to couple the cars together; this difficulty arose from the fact that they were not the same sort of couplers; that he did not know whether the difference in height made them less or more difficult to couple; he coupled the two cars in question by putting a link in the Janney coupler and putting a pin through the hole in that coupler, then laid the link on top of the Miller coupler and put a pin down through it; in both the Janney and Miller couplers there is a slot for a link and also a hole for the pin to go in; he did not put the link in the slot of the Miller, because he could not get it in there; that he could not explain why he did not do it that way; it was a difficult coupling to make either way; he did not remember whether they tried to do it that way or not; he coupled it the best way he could—the easiest way he could couple it; he did not remember whether the difference in the height of the two couplers had anything to do with causing him to put the link on top of the Miller coupler instead of placing it in the slot of the Miller; he did not remember whether it was on a curve or on a straight track when he coupled the cars together; the pin held the link in position on top of the Miller coupler; the link could not very well go over the top of the pin which held it in place; leading over the switch, the two couplers rubbing together forced the pin up out of the hole, so as to pry it up. If he were coupling two cars together the drawheads of which came together plumb and even, one being as high as the other, and each containing a slot for a link and a hole for the insertion of the pin, in coupling them with a link and pin, he would put the link in the slot and not on top of the coupler; on this occasion he laid the link on top of the Miller instead of putting it in the slot, because that was the easiest and best way and the only way he could couple it; the link was too short to put it in the slot of the Miller coupler, but the link was long enough to enable the pin to go down through the hole; where the link is laid on top of the coupler instead of in the slot he does not know what would be the effect upon the rear coach if a slack should take place by the cars coming together; that the coupling which he made was a very ordinary coupling and is made right along; possibly it might hold all right; he had never seen it break loose before; it was customary to couple cars by putting the link on top instead of through the slot; this coupling was caused to break away by the slack running up between the cars when they jolted together—by the Janney and Miller couplers running up together; the rubbing together made the pin raise up and broke it loose; when coaches are properly coupled together they break loose very often in that way; when two

cars are properly coupled with the link and a slack is produced causing them to bump together, they come apart sometimes, although this is very rare and it is also very rare that the other coupling comes apart; when the car broke away he yelled to the rest of the crew who were on the rear end of the car; he was standing on the steps of the tourist car on the end next to the Pullman, which broke away; this Pullman car was called the "Lylete;" he does not remember what became of the link or pin after the car broke away; he looked at the "Lylete" and saw the link, but did not look at it particularly; he did not remember the words he used when he called to the crew; the men on the car, Hottal and Wilhoit, did all they could to stop it; he saw these men putting the brake on at the end of the Pullman car next to him, but could not see what they did at the other end; he did not know whether they left the end next to him for the purpose of putting the brakes on the other end; the car ran a little over a hundred yards probably before it stopped; it was stopped by striking some cars down on the "ladder" track; these cars were loaded with sand and coal, as well as he remembered; the end of this "ladder" track in the neighborhood of South Capitol street was used for shifting purposes and for putting cars or anything there they wanted to store there; he has never seen passenger coaches stored down there because it is not long enough for that; the only cars he ever saw stored there were freight cars. Said witness further testified that he saw Landrigan that night, and when he first saw him he was lying on the ground near to and south of the "ladder" track at South Capitol street; Landrigan was at the side of the "ladder" track, at the intersection of South Capitol street; Mr. Fenton was fixing up his wounds; Landrigan was afterwards carried away in an ambulance and died in a hospital the next morning; at the time witness saw him he looked like he was pretty badly mashed up—looked like he had been run over; that it was about 11.55 p. m. when he saw him; Landrigan lived at 31 or 33 Virginia avenue, on the north side of the railroad tracks; he was a machinist and employed on the night force in the round-house; he had known Landrigan about three years, during all of which time Landrigan had been in the employ of the railroad company. There was a white light in the vestibule of the Pullman car that broke away—in the little dome-shaped arrangement in roof of the car; this was the only light hanging in the vestibule, and there was no light on the platform; the link and pin used in making the coupling were the ordinary link and pin; that two Janney or two Miller couplers will couple together without requiring the use of a link and pin, but a Janney and Miller coupler will not couple of themselves and you have to use a link and pin to couple them; that the Miller and Janney couplers were not intended to couple together.

And thereupon said witness, on cross-examination, further testified that at the southwest crossing of South Capitol street there were four railroad tracks, the first track from the south being the ladder track, the track immediately to the north of it being the north-bound main track, the next track to the north the south-bound main

track, and the fourth track or the one on the north side of the crossing being called the reservation track—a freight track; that the ladder track extended west of the crossing to an alley (the witness indicating a point on the map about a square and a half distant), and east of the crossing it extended to K street southeast; the round-house was a little to the south and east of the crossing and there were tracks connecting it with the ladder track; east of the crossing of South Capitol street were the "Jersey yards" of the company, and all of the tracks in that yard connected with the ladder track; that this is why it is called the "lead or ladder track;" the gateman's box at the southwest crossing is at the northeast corner of the crossing, and at the southeast crossing of South Capitol street it is at the southeast corner; on the west side of South Capitol street there is a pavement leading up to the southwest crossing; there were safety gates on both sides of the railroad track at this crossing, and between the end of the gate on the south side and the tool-house west of the southwest crossing, which is marked on the map, there was a fence, five feet high, which extended up to the gate; that between the ladder track and this fence there is an open or vacant space; between the south rail of the ladder track and this fence or the crossing gates there is a space of about 10 ft.; a person could not walk around the end of the gate and get on the track. Said witness further testified that the ladder track on that night had been in use in their shifting operations from about 7 or 7.30 o'clock; that in these shifting operations they would go all the way down to the crossing at South Capitol street if necessary, but witness did not remember going all the way down there that night; on other nights they had been in the habit of going all the way and crossing South Capitol street when engaged in shifting operations; the ladder track was a track that was used more or less frequently in shifting operations from one end of it to the other; cars were put on the ladder track west of South Capitol street to be unloaded or just to get rid of them for a short while, sometimes; they would put them there so as to have them where they could get hold of the cars handy; they would be put there temporarily during shifting operations. It was not customary to handle passenger cars on that side at the southwest crossing of South Capitol street; witness and his men were freightmen ordinarily, but are called upon now and then to handle passenger cars; on the night of the accident they were handling passenger cars and were making up a train of tourist cars in which to load soldiers to go South; in the shifting operations in the yard in August, 1898, different kinds of cars would be received there—foreign cars belonging to different roads—especially at that time when soldiers were traveling there was a great deal of traffic and they were moving a great many troops; on these cars they would find a great many Miller and Janney couplers; it was more usual to find Miller couplers on foreign cars in August, 1898, than it is today; they are seldom seen now; it was an ordinary occurrence at that time in the yard to couple cars up with Miller and Janney

couplers on them; the Miller and Janney couplers are entirely different and will not couple of themselves; they must be coupled by putting a pin in the Janney and another pin in the Miller and connecting the two with a link; this is the ordinary way of coupling two such cars, and the only way that the witness knew to couple them. Witness followed the runaway car down to the crossing after he got rid of the rest of the cars; he reached there about three minutes after the car passed over the crossing; that he forgets whether he noticed the condition of the gates at that time; the crossing was lighted by the street lamps located on each of the four corners, and there was an electric light in the reservation north of the tracks (indicating a point on the map northeast of the intersection of South Capitol street and the railroad tracks) and another one south and east of the tracks near the signal tower; the lamp in the dome of the vestibule of the Pullman car had a white shade or globe underneath; it gave a bright light—you could see it all right; the lamp was inside of the door and the door was closed; the glass in the door extended about half way down and the light shown through the glass in the door; you could see the light very plainly as you looked at it; the same sort of a light was in both ends of this car. Said witness further testified that if they had not made a link and pin coupling they might have pulled the cars out with a big, heavy chain; a chain is used sometimes when the drawhead is pulled all the way out; where there are two drawheads with a coupler in each drawhead, the ordinary way to couple them is to use a link and a pin whenever the couplers are not alike.

And thereupon, on redirect examination, said witness further testified that he supposed, to guess at it, that the car ran probably a hundred yards from the place where it broke away until it hit Landrigan, and then about twenty-five yards after it hit him before it stopped. Said witness further testified that there were two crossings at South Capitol street, the southwest and southeast crossings; the street was divided by parking which ran in the center of it; these two streets or crossings were about 50 ft. apart; Landrigan was killed at the southwest crossing; the railroad tracks where they intersect with South Capitol street are on Virginia avenue. The nearest electric light to the point where Landrigan was killed was on the east side of the southeast crossing and north of the tracks; this light was about 75 yrds. from where Landrigan was struck. There were nine coaches attached to the engine when the car broke away. The car that broke away was the last coach; Hottal, the yardmaster, was present when witness coupled the cars together; that witness told him that he could couple them up the way they were coupled, and Hottal said, "Couple them up some way, and get them out of here;" at that time the crew was waiting for the car on the main track, and they were in a hurry to get it out; he was having some difficulty to get it coupled when he made this remark at Hottal; it is not true that the cars would not couple at all—they would not couple without using a link and pin; the coupling was safe enough to pull the car out of the yard, and that was all

that was wanted; it did not do it on that night because it broke loose; nothing extraordinary happened to make it break loose; the Janney coupler was about 2½ inches higher than the Miller, but he did not think that the Janney slid all the way over the Miller when they came together; he did not remember testifying at the former trial of the case that "the Janney went clean over the top of the Miller;" the Janney coupler, the lip of it, would not be over 2½ inches thick, which would pretty nearly take it over; it was about 2½ inches higher than the other, but he does not remember whether it went over it or not; whatever he testified to at the former trial was true; the couplings "slipped around," he supposed, when they were going around the curve, and that had a tendency to make them come apart; that he supposed it was due to the slack caused by coming over the switch on the ladder track; that the statement made by him at the former trial that he "used a link, put a pin down through the Miller, just a temporary coupling, to pull the car up this track, and put the link over the Miller, put the pin down in the Miller, and stuck a pin through the link, and the pin having a head on it held in that position, held the link in position to pull the car out; but when it got up on the curve the slack ran together, and probably the pin dropped down; the link jumped over, or twisted off the head of the pin—that is as nearly as I can explain it to you about this coupling"—was substantially correct. Said witness further testified that after the car was coupled they pulled it probably 45 or 50 yards, and when it got on the curve formed by the ladder track and the track from which they were bringing it, it broke away; that he knew this curve was there; that he did not remember testifying at the former trial that they could not stop the car because of a "defect in the brake, the brake did not hold," but that it is true that the brake might have hung in some way; the brake did not hold the car, but he does not know what was the matter with it; that he was taking the train of cars in the opposite direction from the point where Landrigan was killed, and intended to give this car to the crew that was waiting for it on the main track; the reason, as well as he remembers it, why he put the link on the top of the Miller coupler was because the Janney was higher than the Miller; they could have used a chain on that night, but did not have any to use when they wanted to get the car out; there were chains in the yard; he does not know whether the chain would have been perfectly safe or not; the car might have broken away by the chain becoming untied, or loose, or breaking, unless it was very strong; that he did not remember examining the pin on the tourist car, but remembered looking at the pin in the Lylete, the Pullman car; this pin was still in the hole in the link, and this satisfied him that the link had pulled over the head of the other pin.

And thereupon said witness, on recross-examination, further testified that the head of the pin would not go through the hole in the link and would hold it in position; that the drawhead was a big piece of iron fastened to the end of the car, and the coupler was at-

tached to the end of the drawhead; when the drawhead is completely pulled out the coupler comes with it; when two cars are in that condition they have to use a chain to keep them together; when the cars have a complete drawhead and coupling attached, no chain is necessary, and they simply used a link and pin coupling when the couplers are not alike; this was the way they did on that night; there was nothing the matter with the drawheads; they were simply different couplers and would not couple; they were getting these cars out to put them on the train that Fenton's engine was attached to; this train, as well as he remembered, was standing on the southbound main track, facing towards the depot; when he reached the crossing after the accident he found the engine standing there on either the main track or No. 1 track, right close to the point where Landrigan was found and about 25 yards distant; it was about northwest of the crossing, on the north side of the track, and about 10 yards from the crossing; that he did not remember exactly the position of the engine—he saw it over there, but did not take particular notice whether it was on the crossing or not.

And thereupon, on re-redirect examination, said witness further testified that Fenton's engine and train were standing nearer the southwest crossing than the southeast crossing; the engine was headed south or towards the depot, and, as well as he remembered, about 10 ft. from the southwest crossing; that he did not remember whether or not it had any box cars attached to it.

And thereupon the plaintiff, further to maintain the issues upon her part joined, read in evidence the testimony of KENNETH D. WILLHOIT, deceased, who testified for the plaintiff at a former trial of the cause. Said witness testified that he had been in the employ of the Philadelphia, Wilmington & Baltimore Railroad Company as brakeman for five years; on the night Landrigan was killed he was acting as flagman in the yard in connection with the yard engine; he did not know Landrigan personally; had seen him a number of times; he saw him after he was hurt; Landrigan's legs were run over, but he could not say whether it was by a car or another train; train No. 78, which left the depot about 11.55 or 11.35, was passing there about the time of the accident; this train No. 78 is known as the midnight express for New York and crossed South Capitol street, where Landrigan was hurt, going in an easterly direction; when witness saw Landrigan the latter was lying on the south side of the outside rail of the "ladder track," the most southerly track of the four tracks at that crossing; there is a tool-house to the west of that crossing, and a fence running along south of the tracks and in front of the tool-house; Landrigan was between this fence and the outside rail of the "ladder" track; immediately before he saw Landrigan lying there the coach "Lylete" passed over the crossing at South Capitol street and witness came right along behind this car, after train 78 passed, to see if the coach had done any damage down there and saw Landrigan lying there with some one around him; he went down where the car had stopped and came back and found out what

the trouble was; that Motley was the conductor of the yard engine and Anderson the engineer; he thinks there were five or six coaches attached to the yard engine; that an ordinary passenger coach is 60 or 70 feet long; Hottal, the yardmaster, Motley, and himself made the coupling; one car had a Miller, and the other—the one that broke away—had a Janney coupler; it is impossible to couple a Miller and Janney together; it was on a curve, and therefore they used a link and pin; it was a secure coupling to pull the car around in the yard, but it was not a safe coupling to run over the road; it was sufficient for the yard and was very frequently done; the couplings did not couple exactly because they did not fit; you cannot couple two such couplings together and have to use a link and pin; the Miller coupler is not as high as the Janney; it is a thinner piece of iron and the draw-head is thinner than that of the Janney; the link was put in the Janney all secure and then laid over the top of the Miller and a pin run through the top of the link and down through the hole in the Miller; there was a place in the Miller coupler for the link to go in, but it was a little lower and it could not be put in there on account of that curve; they coupled the cars right on a curve; the curve swayed the car around and brought the Miller coupler out on the side, like; when the pin was put down through the link and into the hole in the Miller coupler the head of the pin was on top of the link, and the only thing to keep the link from slipping over the head of the pin was the shoulder around the head of the pin; that he supposes it would have been safer if they could have put the link through the regular place for that purpose in the Miller coupler; when they were pulling the car out on the straight track he tried the brake and it appeared to be all right, but when some one hollered that this car had broken off he went to work on it again; it did not seem to catch hold; he dropped off the end of the car and caught the rear end of it—the head end—and at the same time Hottal got on the end that he got off of; the witness called for Wilber to help him to put the brake on and they did all they could to stop the car, but the car had got too much start; the brake seemed to work all right—he did not have any fault to find with the brake, only the car had gotten too much start; he first tried the rear brake and could not get that to work; then went to the other one; while witness and Wilber were working on the forward brake Hottal jumped on and tried to work the rear brake; they did not succeed in stopping the car, because it had gotten too much of a start. He got off at South Capitol street on the southeast side, stood there for a second or two, and then ran after the car to see what damage it had done. There were some other cars down on the end of this track, that this car ran into, and it would not have been safe for the witness to have stayed on the car. He found out that the car had broken loose by some one hallooing (there were five of them around there at the time), but cannot say who it was or from which direction the sound came; the car was running slowly when he started to put on the brake. He jumped off, went to the other end, and when he

got there the car was not running very fast. Hottal had got on the rear end just as he got off. That he does not know whether or not he said at the coroner's inquest that "he did not think the brake was any good or else it would have stopped the car," nor could he say whether he testified at the inquest that the front brake was loose and was not doing any good. The brake did not do any good, because the car had too much start; Wilber jumped off with him; that you sometimes apply a brake and it does not "take up" right at first; that he could not say whether he noticed any slacking up of the car as a result of putting on the brakes, because he got off, and it was dark, night-time, and he could not see; that he could not say whether he noticed any slacking up before he got off the car, because the brake had not taken any hold, so far as he knew; both Wilber and himself put the brake on as hard as they could; there was a light on both ends of the coach; there was a light in the coach, but none on the back platform; when he jumped off he did not exactly keep up with the car, but followed it down because 78 was coming at that time and he was afraid the runaway car would knock some of the cars out on the main track, and he followed down to see whether there was any trouble; that he practically kept up with the car, but was a little distance behind it; the car ran across the southeast and southwest sides of South Capitol streets, beyond the point where Landrigan was, and into some flat cars loaded with dirt.

Said witness, on cross-examination, further testified that the Jersey yards consisted of a network of tracks between South Capitol street and New Jersey avenue, south of the main railroad tracks; that what is called the "old Jersey yard" contained tracks from *1* to *11*, and the "new Jersey yard" began with track *4* and ran up to number *9*; that on the other side or east of the Jersey yards was what is called the "engine yard;" the old and new Jersey yards are used for the storage of all passenger cars, sleepers, baggage and box cars, freight cars of all descriptions, and also as a yard to unload coal and to load different freight. There is a fence running from the southeast side of South Capitol street, from the gate-tender's box to the southwest side of South Capitol street, the side next to the tool-house; that at both the southeast and southwest crossings are crossing gates, which come right up to the fence; these gates are double gates, and if they are down it is impossible for anybody to cross the track at either of the crossings at South Capitol street without getting under them; at the southeast crossing they could walk around the end of the gate, but they could not at the southwest crossing; Landrigan was found on the southwest side of the southwest crossing and on the south side of the tracks; this "ladder" track is a straight track, running from one end of the yard to the other; it is also called the "lead" track because all the other tracks in the yard lead into it; if they wanted to get a car out of the other tracks it would be pulled out on this "ladder" track; on this night they were engaged in making up an equipment of cars to carry soldiers South; there were some flat cars, stock cars, coaches, and this sleeper for the officers, he supposed; they were pulling five

or six cars out to get this sleeper—the "Lylete"—to put it on the rear of the train, their intention being to shove the remaining cars back into the track from which they got them; that he saw the coupling made, but did not make it himself; when they found cars with the old-fashioned drawhead, and wanted to couple them to a car with a Janney coupler, they used a link and pin, which was the usual coupling when they got cars of that kind; this was done very frequently, but it is not done so much now as formerly because they get more cars with the new equipment; that he did not say the Miller coupler was lower than the Janney, but that it was not as thick as the Janney, which made it apparently lower than the Janney when the cars came together; that they laid the link on top of the Miller because they could not get it into the groove; the top of the pin was holding it in place; the track on which the runaway car was ran parallel with—right by the side of—the track on which No. 78 was coming; he jumped off the "Lylete" on the southeast side of South Capitol street; 78 passed first and then he ran down the north-bound track behind the "Lylete;" that he saw some one was hurt when he went down, but did not stop because, by the light being in the car, he thought perhaps there was a porter or somebody in there, and ran down to see what damage had been done to the car; when he saw nothing serious had happened, he came right on back to see this object; it was not over three minutes—not over two minutes—when he got back. When he got back he saw Mr. Fenton behind, attending to Mr. Landrigan, with his torch. Fenton had started to bind up Landrigan's legs; Fenton's engine was on the opposite side, on the 4th track, on the north side of the south-bound track. It was standing about on South Capitol street, on the southeast side; he does not remember whether it was all the way over the crossing or not; he thought it was. It was just across from where Landrigan was lying, and was partially on the crossing; the gates were down; he first noticed the gates when he came down there after he had jumped off the end of the car; the gates were down then on both sides of the street. He did not notice the gates before 78 passed, because he had not been down that far; he stood on the southeast side of South Capitol street until 78 passed, and then started to run down the main track, and as he ran down the track he noticed that the gates were down on both sides.

Said witness, on cross-examination, further testified that when he reached Landrigan the latter was conscious to a certain stage; he asked Fenton who it was, and Fenton said it was "Tom Landrigan." When he got back where Landrigan was, Hottal, the yardmaster, Mr. Fenton, and Mr. Bright were there, and either Mr. Hottal or Mr. Bright asked Landrigan, "How did this thing happen?" and Landrigan said, "I came under the gates and something struck me, and a whole string of cars ran over me;" that was all witness heard him say. He did not hear him say anything about train No. 78; nothing more was said that he can remember; he saw Landrigan put in the ambulance which came up pretty soon

after the accident—about as soon as they could get there; the gates were raised when Landrigan was put in the ambulance. Said witness further testified that the lead or ladder track is used all the time, backwards and forwards, on week days especially, and very frequently on Sundays for putting cars in and pulling them out; that the light in the car was in the dome—in the vestibule—just on the outside of the door, over the platform; he knows there was a light in the west end of the car, the end going toward South Capitol street—which was the front end of the car the way it was moving; this light could be seen more plainly than a lamp; such lights contain two burners, are lighted by oil, and are more brilliant than a lantern; the reflector is over the top of the light; there is a kind of white shade over them. Said witness further testified that between the gate and the first rail of the track south of which Landrigan was found there was a clear space of about 14 or 15 feet; the tool-house set off from the gate about 17 ft., and Landrigan was nearer the tool-house than the gate; he was nearer the track than the gate, but inside of the gate. Said witness further testified that the runaway car passed the southwest crossing of South Capitol street before No. 78 reached there; it struck just the middle part of No. 78 as the train came by there; the runaway car had just about gotten across the crossing when the engine of No. 78 began to cross the crossing; it was almost at the same time.

Thereupon, upon redirect examination, said witness further testified that the light in the vestibule of the car could be seen by people on the ground; it hung down low and did not set right up in the dome; it had a shade over it, but he does not know whether you could call it a reflector or not; it was plain enough to be seen by anybody who was on the ground; that he did not remember stating at the coroner's inquest that "he would expect a coupling like that to give away—that it was an unsafe coupling. Said witness further testified that there were some cars standing on the end of the ladder track; that his track is a blind track down there—it stops right at the end of the property yard; it ran alongside of the property-yard fence and stopped on the southeast side of the F Street crossing."

Plaintiff introduced evidence tending to show that the south or ladder track, on or near which it was admitted on the trial by her counsel that her intestate went under the gate and must have stood, extended west about 200 feet from the crossing. One witness called it a "dead track," "because it does not lead anywhere, but just stops." That the part of this track as far as the South Capitol Street crossing was used chiefly for storing cars with supplies of coal and other things for the use of the railroad company, and was not used for making up trains. That no passenger cars were brought that far down and the moving of freight cars thereon was for the purpose of taking in and taking out those put there from time to time as aforesaid, some of which were generally standing there, as they were on the night of the accident. That the grade of the ladder track inclined to this western end, and gravity would carry down to it, a car that might break loose above. That cars standing on this

track would obstruct the view of trains coming from the depot on the inner or main tracks; the watchman's box and tower house also obstructed the view to the east, and one would have to leave the gate and get on or near the ladder track to see cars coming for some distance. That curves in the tracks also tended to prevent the observation of moving cars.

The testimony of another witness for the plaintiff is given in full as follows:

"FRANK C. KAPPEL testified that he was a brother of the plaintiff, Mrs. Landrigan; that in August, 1898, he was employed at the Penna. R. R. Company's round-house; that Landrigan was employed there as a machinist, and was on the night force; that between 12 and 1 o'clock they were allowed one hour for lunch, and Landrigan was in the habit of taking that hour off; Landrigan had been in the employ of the railroad company for about nine years in this same place and had been living on the north side of Virginia avenue ever since witness first knew him; the night Landrigan was killed was not a clear night nor was it a really dark night—there was no moon and there were a few clouds; that the most usual and direct route to Landrigan's house from the round-house was up South Capitol street to the southwest crossing, then right over to the north side of Virginia avenue; this was the way Landrigan usually took; the round-house was between H & I streets on South Capitol street, about 50 ft. from the building line of South Capitol street. Said witness further testified that he saw where Landrigan was picked up after he was hurt; he was a little west of the southwest crossing, in front of the tool-house; he saw blood around there and a little proud flesh right alongside the south track which is called the ladder track; this blood and flesh was on the south side of the ladder track; he saw it on the morning of the accident about half past four o'clock. Landrigan died at the Emergency hospital a little after four o'clock on the morning of the accident.

And thereupon said witness further testified that train No. 78 for New York was scheduled to leave the depot at 11.50 or 11.55.

That the place he noticed this blood, &c., was at the southwest crossing, a little west of the crossing; that the distance from the gates to the southernmost rail of the ladder track at that point is about 15 feet; that the portion of the ladder track lying west of the southeast crossing is used for storing gravel cars and unloading coal; when they unloaded it they shoved it down there alongside of the property yard of the railroad company and put it right over the fence; it was never used for shifting or for making up or breaking up trains or for storing passenger cars; the portion of this track east of the tower was used for shifting cars; this portion west of the tower was hardly used at all—just for storing a couple of cars down there; this tower and the yardmaster's office indicated on the map are the same; in August, 1898, when Landrigan was killed, witness was employed at the Penna. R. R. round-house, and had been so employed for about 6½ years, and was familiar with the use of those

tracks; on the night Landrigan was killed there were two cars, one containing gravel, west of the southwest crossing; with these two cars standing there on the west end of the ladder track a person could not see anything coming from the west if he were standing immediately outside of the south gate; the only way he could see would be by walking out on the track and looking up and down; that standing outside of the gate the flagman's box at the southwest corner of the southeast crossing and the tower beyond would obstruct the view of the ladder track looking east. Said witness further testified that in August, 1898, he was working in the daytime; that he had worked on the night force, but not during the year 1898; that he had occasion to cross the southwest crossing, at night, immediately prior to and about the time of Landrigan's death; that the gates as a general thing, in the night-time, were down; that during the summer of 1898, and for five or six years previously, he had passed over this crossing three or four times a week at all hours of the night up to 1 o'clock, and that after 11 o'clock he generally found the gates down whether trains were passing or approaching or not; after 11 o'clock the gates were generally kept down whether there was a train in sight or not. Said witness further testified that there was an electric light on the north side of the southeast crossing, about 200 ft. from where Landrigan was killed; he had never noticed whether this electric light furnished any light of any consequence at the intersection of South Capitol street S. W.; that if a train were standing on the north track a few feet from the southwest crossing it would have the effect of making it darker at the gates at the southwest crossing. And thereupon said witness further testified that the ladder track west of the southeast crossing is always rusty, and the track that is used for shifting purposes is always bright.

And thereupon said witness, over the objection of counsel for the defendant, was permitted to testify that he and Landrigan used to go home together for two or three months; that they both worked at night at the time; that the gates were down and that they had to crawl underneath the gates to get home; that the gates were generally kept down and they very seldom ever saw the gates up; that the times when Landrigan and the witness crossed were between 12 and 1 o'clock at night and between 6 and 7 o'clock in the morning.

And thereupon said witness, on cross-examination, testified that he had been in the employ of the railroad company for between six and seven years prior to March 1900, excepting a period of about three months, about three years before Landrigan's death; that he "notices" the rust upon the south track pretty nearly every time he passes there; that he noticed it "this morning;" there are four rails there that are bright, two are rusty, and two others are not so rusty; he has noticed this condition ever since he has been crossing there for the last twenty years; this rust was west of the southwest crossing; he did not remember testifying at the former trial about there being rust on the tracks, because he was not asked the question; counsel asked him about the rust "this morning" for the first

time; the south track is pretty well rusted—is rusty all the time; he knows two tracks are bright, and the track fartherest north is not as bright as the middle tracks; that he did not know whether or not the center tracks have steel rails and the north and south tracks iron rails, but did know there was a difference in their weight, the rails of the middle or main tracks being heavier; these tracks are more constantly run over and this tends to keep them bright. Said witness further testified that his mother lived north of the tracks, and that he visited her sometimes two or three times a week after he moved south of the tracks; when Landrigan was hurt witness was on the day shift; the time he worked on the night shift was for three or four months in the early stages of his employment by the company, and afterwards for three or four months when he returned to the service of the company and 2½ or 3 years before Landrigan's death; that when he crossed the tracks with Landrigan at night they were coming home to lunch between 12 and 1 o'clock. This was about 3 years prior to Landrigan's death; witness did not cross with him while witness was working in the daytime. Said witness further testified that the western end of the south track was used for storing cars and taking cars in and out for the purposes of the property yard; that he has seen these cars lie there two or three weeks after they were unloaded; that they might have taken the cars out immediately after pushing them in, but he did not see them taken out; the two cars that were on this track when Landrigan was killed had been there for two or three days; that he did not know whether or not these cars had been pulled out and put back during these two or three days, but he noticed the number of one of the cars, and the other car looked like the same car. Said witness further testified that he calls "shifting" moving cars from one track to another, and what they call a shifting track is generally used every day for shifting; that he has hundreds of times seen cars on that south track and knows they were put in and pulled out, but would not call the process of putting them in and pulling them out "shifting;" that when he testified at the former trial that the shifting is very general down there, he meant that they shifted cars down there to load and unload in the property yard; that this track has only an outlet to the east, but in this respect it is similar to every other track in the yard; the only way in differs from them is that it is about 8 or 10 hundred feet from any switch along there; on the east this track communicates with every other track in the yard by a switch, and, with the exception of the two main tracks, every other track in the yard has a blind end to it. Said witness further testified that during the year prior to Landrigan's death he crossed at this point, at night, after 11 o'clock, on an average of about once a week, or a little oftener; that he usually found the gates down whether trains were in sight or not; he has come there after 12 o'clock at night, when no trains were in sight, and found the gates up, but very seldom; he has found them up only when somebody hallooed to the man to raise them up; that after

the traffic of the day was over they would put the gates down and keep them down unless somebody asked to have them raised; this crossing at night is not used as much as in the daytime; most of the shifting and switching is done up towards the eastern section of South Capitol street; that every train that comes from the 9th Street freight station or 6th Street depot, going north, and every freight and passenger train coming from the north would have to cross the South Capitol Street crossing; that the shifting engines also cross there very frequently in the night-time; that engines from the round-house would come out on the ladder track, and then be shifted on the track upon which they were to operate, and all detached engines coming to or going from the round-house pass over the South Capitol Street crossing; that between 12 and 4 or 5 o'clock it is not very busy down there at this crossing. And thereupon said witness admitted having testified at the former trial that he "went around to see his mother once or twice a week, and when he passed going to work sometimes, the gates were up and sometimes down and there was no train in sight;" that he always found the gateman there when he was passing at night; when he got there at night and found the gates down he could not see whether there was a train in sight until he got out on the track and looked up and down; that he has found the gates down at night and walked out on the track and found a train or engines approaching or passing; that the watch-box south of the ladder track interfered with the view down that track to the east—the closer you get, the greater the obstruction from this box and the further away the more view you had of that track; that he thought, standing inside of the gates, the watch-box located outside of the gates and next to the fence south of the track would prevent a person seeing anything up that track; that you would have to get on the track before you could see up there on account of this watch-box, the fence, and the telegraph pole which were there; that west of the southwest crossing, towards F street, there is a curve; that you could not see around that curve until you got on the north side of the crossing; that although you could not see a train coming from that direction until you crossed the tracks you could hear it unless there were two or three trains passing at the same time, or an engine blowing off steam—then you could not hear anything; that he has crossed over at night and found the gates up and when no trains were coming, but people were passing under, halloaing to the watchman to raise the gates; that the gates were never hoisted all the way—they were on a slant.

And thereupon said witness, on redirect examination, testified that there was no shifting and making up or breaking up of trains on the southwest crossing, on the south track; that this was done east of that crossing, and the only trains that crossed there, freight or passenger, were trains that were already made up; that once in a while a passenger engine comes down from the Jersey yard on the north side of the crossing and switches off onto another track to get a car or something like that. Said witness further testified that

they would hoist the gates at night high enough for a man driving a buggy to go under them, and then lower them again; that this south track from the southeast crossing to its western extremity was rusty—you could see it was seldom used."

Plaintiff offered five other witnesses, who resided in the neighborhood and were familiar with the crossing. Their testimony tended to prove that the gates were generally down at night after ten or eleven o'clock until near day-light, whether trains were passing or not, and that passers in vehicles would frequently have to call up the gate keepers to raise the gates. Passers on foot would do the same or pass under the gates, which were bars merely that could be lowered and made to touch ends several feet above the ground.

Other evidence tended to show that a Pullman car, running about the speed of the car which is supposed to have struck the deceased, would make "practically no noise at all," and that the vestibule light therein is so located as to illuminate the platform only, which is its purpose. The light is not intended to illuminate the track and will not cast its reflection more than two feet beyond the bumper of the car, but one standing some distance away would see the reflected light on the platform.

No witnesses were introduced on behalf of the defendant.

1. Upon the evidence which has been recited, the court submitted the case to the jury, giving certain instructions asked by the plaintiff and denying all those asked on behalf of the defendant.

Exceptions were duly reserved to the grant and denial of these instructions, respectively, but it is not considered necessary to repeat them as they only present with elaboration the substantial propositions, founded on the insufficiency of the evidence, upon which the appellant relies.

2. Whether the deceased was run over by the Pullman car that broke loose and ran down the first or "ladder" track, or by the express train which passed on the adjoining track, near about the same time, was unquestionably for the ascertainment of the jury.

There was no direct evidence showing upon which of these two tracks the accident occurred, but many circumstances established by the evidence indicated that the deceased was struck by the Pullman car whilst on or near the "ladder" track. And it cannot be assumed that these were completely refuted by the declaration of the stricken and suffering man, that he had been run over by "a whole string of cars."

3. Whether, if the deceased was run over by the Pullman car whilst on or near the ladder track, it was negligence on the part of the defendant's employees to permit that car to escape and run down the track past the street crossing, was also properly submitted to the jury.

The testimony relating to the manner in which the Pullman car had been coupled to the next car ahead of it, as well as to the failure of the attempted operation of the brakes, came entirely from the employees upon whom the charge of negligence rests.

It has been recited in the statement of the facts of the case heretofore given as it appears in the bill of exceptions, and is so direct and plain, that its review would not make the question plainer. In our opinion, the least that can be said of this evidence, is, that reasonable men may fairly differ as to whether or not it disclosed negligence.

"It is only where the facts are such that reasonable men *must draw the same conclusion from them*, that the question of evidence is ever considered as one of law for the court." T. & P. R. Co. *v.* Gentry 163 U. S. 363, 366; Cowen *v.* Merriman 17 App. D. C. 186, 202. See also Adams *v.* W. & G. R. R. Co. 9 App. D. C. 26, 31, and cases cited.

4. The chief reliance of the appellant is upon the contention, that the court erred in refusing to direct the jury to find for the defendant on the ground that the evidence showed, as matter of law, a plain case of contributory negligence on the part of plaintiff's intestate.

(1.) The exceptional conditions which make it the duty of the court to take from the jury the determination of the question, whether, in a particular case, negligence has been shown to exist, have been stated hereinabove with a citation of the supporting authorities. After a careful examination of the testimony, we are not satisfied that those conditions exist in the case at bar. What was said in one of the cases before cited is quite applicable to the facts now under consideration: "In this case it may well be contended that the proof of contributory negligence on the part of the deceased is strong, and many reasonable minds might be decidedly inclined to conclude from it that the deceased was guilty of contributory negligence in causing the accident. But the state of proof is such that we can not say that *all reasonable men* would so conclude. The court below thought that the evidence was not conclusive, and the jury concluded that the evidence was not sufficient to establish the fact that the deceased, by his own fault and want of caution, contributed to the production of the disaster." Cowen *v.* Merriman 17 App. D. C. pp. 202, 203.

(2.) In submitting the case in all its bearings to the jury, the court correctly charged them that what is proper care and caution can not be arbitrarily defined, but must depend upon the special circumstances and surroundings of the particular case. What may be ordinary care under one set of circumstances might be gross negligence under different surrounding conditions. Grand Trunk R'y Co. *v.* Ives 144 U. S. 408, 417.

(3.) As no witness saw the deceased immediately before he passed under the arm of the gate, or between that time and the receipt of the injury, and his only statement was that he had been run over by a whole string of cars, the jury had the right to presume that he had both looked and listened for approaching cars before stepping on, or dangerously near, the track, whichever he may have done.

The court did not err in so charging them with respect to this presumption, saying, at the same time, that it might be rebutted by facts and circumstances from which the contrary could reasonably

be inferred. T. & P. R'y Co. *v.* Gentry 163 U. S. 353, 367; Cowen *v.* Merriman 17 App. D. C. 186, 204.

The facts and circumstances relied on by the appellants to show that the deceased did not stop, look, and listen, are these, briefly stated: He saw and passed under the warning gate, and walked upon or across a track that was in common and frequent use for shifting cars. The car which struck him, came with no great speed down the track with a light in the dome of the vestibule. Hence it is argued that he would necessarily have seen and heard it had he stopped, looked and listened as a man of ordinary care should have done.

The fact that the deceased did not stop and remain at the gate has direct bearing on the general question of his contributory negligence and will be recurred to at a later stage.

It seems to have no important bearing on the particular fact whether deceased stopped, looked and listened for the approaching car or cars before reaching the adjacent track. It was not immediately at the track, and the evidence tended to show that approaching cars could not be seen from it for any distance. Moreover, deceased was familiar with the crossing and the gate gave him no notice of anything that he did not already know in respect of the number, proximity and use of the tracks.

On the other hand the evidence tended to show, that freight cars were occasionally stored on the ladder track east of the street crossing; that it was not regularly used at that point for making up trains; that passenger coaches were not run down that far; that a Pullman car running down the track in the manner described would make little or no noise; that the light in the vestibule dome was not a head-light, and that its reflection was cast upon the platform and not more than two feet beyond the car bumpers; the night was a dark one, and the electric lights not very near; moreover, the express train which must have passed about the same time added to the noises, and its smoke and that of an engine of a freight train which stood on the third track and nearly opposite the crossing, tended to increase the obscurity. Whether, from all these circumstances it was to be inferred that the deceased did not stop, look or listen, but walked recklessly to his death, was a question for the jury.

(4.) Without pausing to review the authorities cited on behalf of the appellants, it may be conceded that, where a gate is maintained at a crossing, and regularly lowered when trains are expected, and kept lowered until they shall have passed, and is then uniformly raised and kept raised when none are due or expected, it is a warning of danger to the public and sufficient, under all ordinary conditions, to justify the conclusion of contributory negligence, as a matter of law, on the part of one who undertakes to cross the tracks while the gate is down, and is run over by a passing train in so doing, See also R. R. Co. *v.* Carrington, 3 App. D. C. 101, 111, and cases cited.

But that is not the case presented by the evidence. The gate had not been uniformly lowered and raised for the purpose of warning

on the one hand, or of assurance on the other. The evidence tended to show that the gates were often lowered from ten to eleven o'clock at night and kept lowered until daylight the next morning, without regard to the passing of trains.

Passengers desiring to cross in vehicles were frequently compelled to call up a gateman to raise the gate. Persons on foot would do the same or else pass under the gate and then across the tracks.

This state of things had existed for some years during which the deceased was almost nightly engaged in crossing the track at that point in going to and fro between the machine shop and his home.

Under this evidence, we do not agree with the contention that all reasonable minds must necessarily come to the one conclusion that deceased was guilty of contributory negligence in passing under the gate and attempting to cross the tracks, without any other act of negligence. Finding the gate closed under these circumstances, the deceased was not bound in law to take it as a warning of immediate danger, and to stop and wait and call for information to an unseen gateman. If in fact there was a gateman within sight or hearing at the time, there is nothing in the evidence from which it could be inferred. That the evidence does not show that the gate was invariably kept down each night between eleven o'clock and day light we regard as immaterial so far as the question of law is concerned. The constancy or variableness of the practice was a question merely, of more or less weight, according to the facts and circumstances, for the consideration of the jury. And the court did not err in submitting the whole question to them, as was done, under a full, fair and appropriate charge.

The judgment will be affirmed with costs; and it is so ordered. *Affirmed.*

TUESDAY, *May 13th, A. D.* 1902.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY and The Philadelphia, Wilmington and Baltimore Railroad Company, Appellants,
vs.
CATHARINE LANDRIGAN, Administratrix of the Estate of Thomas J. Landrigan, Deceased.
No. 1168, April Term, 1902.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said supreme court, in this cause be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE SHEPARD.

May 13, 1902.

TUESDAY, *May 20th, A. D.* 1902.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY and The Philadelphia, Wilmington and Baltimore Railroad Company, Appellants,
vs.
CATHARINE LANDRIGAN, Administratrix of the Estate of Thomas J. Landrigan, Deceased. } No. 1168.

On motion of Mr. J. S. Flannery of counsel for the appellants, it is ordered by the court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond to act as supersedeas is fixed at the sum of ten thousand dollars.

UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between The Baltimore & Potomac Railroad Company, and The Philadelphia, Wilmington & Baltimore Railroad Company, appellants and Catharine Landrigan, administratrix of the estate of Thomas J. Landrigan, deceased, appellee, a manifest error hath happened, to the great damage of the said appellants as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of May, in the year of our Lord one thousand nine hundred and two.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Know all men by these presents, that we, The Philadelphia, Wilmington & Baltimore Railroad Company and The Baltimore & Potomac Railroad Company, as principals, and The American Surety Company of New York, as surety, are held and firmly bound unto Catherine Landrigan, administratrix of Thomas J. Landrigan, de-

ceased, in the full and just sum of ten thousand ($10,000) dollars to be paid to the said Catherine Landrigan, administratrix of Thomas J. Landrigan, deceased, her certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of May in the year of our Lord one thousand nine hundred and two.

Whereas, lately at the April term, 1902, of the Court of Appeals of the District of Columbia, in a suit depending in said court between The Philadelphia, Wilmington & Baltimore Railroad Company and The Baltimore & Potomac Railroad Company, appellants, *vs.* Catherine Landrigan, administratrix of Thomas J. Landrigan, deceased, appellee, a judgment was rendered against the said The Philadelphia, Wilmington & Baltimore Railroad Company and The Baltimore & Potomac Railroad Company, appellants, and the said The Philadelphia, Wilmington & Baltimore Railroad Company and The Baltimore & Potomac Railroad Company, appellants, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse said judgment in the aforesaid suit, and a citation directed to the said Catherine Landrigan, administratrix of Thomas J. Landrigan, deceased, citing and admonishing her to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next.

Now, the condition of the above obligation is such, that if the said The Philadelphia, Wilmington & Baltimore Railroad Company and The Baltimore & Potomac Railroad Company shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

THE PHILADELPHIA, WILMINGTON & BALTIMORE RAILROAD COMPANY,
By F. D. McKENNEY, [SEAL.]
Its Attorney in Fact.
THE BALTIMORE & POTOMAC RAILROAD COMPANY,
By F. D. McKENNEY, [SEAL.]
Its Attorney in Fact.

[Seal of the American Surety Company.]

THE AMERICAN SURETY COMPANY OF NEW YORK,
By JNO. S. LOUD, *Resident Vice-President.*

Attest: LEONARD DAMMANN,
Resident Ass't Secretary.

Sealed and delivered in the presence of—
J. S. FLANNERY.
L. BERT NYE.

Approved by—
R. H. ALVEY,
Chief Justice.

O. K.
J. J. DARLINGTON,
CHAS. A. DOUGLASS,
J. D. WRIGHT,
(By C. A. D.)
Attorneys for Appellees.

Washington agency No. 323.

(Endorsed:) No. 1168. Catherine Landrigan, administratrix of estate of Thomas J. Landrigan, deceased, *vs.* The Philadelphia, Wilmington & Baltimore Railroad Company and The Baltimore & Potomac Railroad Company. Bond on writ of error to the Supreme Court of the United States. Court of Appeals, District of Columbia. Filed May 29, 1902. Robert Willett, clerk.

UNITED STATES OF AMERICA, *ss:*

To Catharine Landrigan, administratrix of the estate of Thomas J. Landrigan, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein The Baltimore and Potomac Railroad Company and The Philadelphia, Wilmington and Baltimore Railroad Company are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 29th day of May, in the year of our Lord one thousand nine hundred and two.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted May 29th, 1902.

J. J. DARLINGTON,
CHAS. A. DOUGLASS,
J. D. WRIGHT,
Attorneys for Catharine Landrigan, Adm'tx.

[Endorsed:] Court of Appeals, District of Columbia. Filed May 29 1902 Robert Willett, clerk.

Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 73, inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of The Baltimore and Potomac Railroad Company and The Philadelphia, Wilmington and Baltimore Railroad Company, appellants *vs.* Catharine Landrigan, administratrix of the estate of Thomas J. Landrigan, deceased, No. 1168, April term, 1902, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 31st day of May A. D. 1902.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 18,583. District of Columbia Court of Appeals. Term No. 71. The Baltimore & Potomac Railroad Company and The Philadelphia, Wilmington & Baltimore Railroad Company, plaintiffs in error, *vs.* Catharine Landrigan, administratrix of the estate of Thomas J. Landrigan, deceased. Filed June 12th, 1902.

FILE COPY.

FILED
NOV 16 1903
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 71.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY AND THE PHILADELPHIA, WILMINGTON AND BALTIMORE RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

CATHARINE LANDRIGAN, ADMINISTRATRIX OF THE ESTATE OF THOMAS J. LANDRIGAN, DECEASED.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFFS IN ERROR.

FREDERIC D. McKENNEY,
J. SPALDING FLANNERY,
Attorneys for Plaintiffs in Error.

WAYNE MACVEAGH,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 71.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY AND THE PHILADELPHIA, WILMINGTON AND BALTIMORE RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

CATHARINE LANDRIGAN, ADMINISTRATRIX OF THE ESTATE OF THOMAS J. LANDRIGAN, DECEASED.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFFS IN ERROR.

GENERAL STATEMENT.

This case comes before this court on writ of error sued out by the railroad companies, who were defendants below, to review a judgment of the Court of Appeals of the District of Columbia affirming a judgment of the supreme court of said District in favor of the defendant in error and plaintiff,

Catharine Landrigan, as administratrix, for the sum of $6,500.

The plaintiff declared in tort under the death statute in force in the District of Columbia and claimed damages in the sum of $10,000 for the alleged wrongful and negligent killing of her husband, Thomas J. Landrigan.

She asserted in the declaration that the defendant companies owned and operated a certain steam railroad in the city of Washington having tracks on Virginia avenue southwest crossing South Capitol street; that it was the duty of the defendants to guard and protect the public from trains and engines propelled upon said tracks and to securely couple together and properly equip their cars with safe and efficient brakes and to give timely warning and notice of the approach of all engines and cars moving upon said tracks to persons desiring to cross said tracks at the intersection of the aforesaid street and avenue; but that said defendants, on the 29th day of August, 1898, disregarding their duty in the premises, so negligently operated a car or cars at said intersection that the deceased, Thomas J. Landrigan, while attempting to cross said Virginia avenue southwest, without want of reasonable care on his part, was thrown down and run over by a car which defendants' employees were shifting upon one of said tracks.

The defendants pleaded the general issue, and the case came on for trial before Mr. Chief Justice Bingham and a jury, and resulted in a verdict and judgment in favor of the plaintiff for $6,500 and costs of suit.

FACTS.

South Capitol street, at its intersection with Virginia avenue, is divided by a parking or open space into two crossings—the southwest and southeast crossings—which were about fifty feet apart. AT BOTH CROSSINGS THE DEFENDANTS MAINTAINED SAFETY GATES AND ATTENDANT GATEMEN, AND FENCES EXTENDED UP TO THE GATES, SO THAT WHEN THE GATES WERE CLOSED OR LOWERED THEY COMPLETELY SHUT OFF THE RAILROAD TRACKS FROM THE FOOTWAY USED BY PEDESTRIANS,—"these gates are double gates, and if they are down it is impossible for anybody to cross the track without getting under them" (14). The gates at the southwest crossing were operated by a gateman whose box was situated at the northeast corner of said intersection, on the opposite side of the tracks from that on which the deceased, Landrigan, is supposed to have approached the crossing. At this crossing the defendants maintained and used four tracks—the most northerly, called the "reservation" or "No. 1" track, was used for freight and shifting purposes; the two intermediate tracks by north and south bound passenger trains, and the most southerly, called the "lead" or "ladder" track, was also used in shifting operations at this point. This "ladder" track was so called because it was a straight track, running from a point a square and a half west of the southwest crossing completely through the railroad yards of the company to the east as far as New Jersey avenue. Every other track in the railroad yard connected with it, and all the switches led into it (8). The eastern portion of it was constantly used for shifting,

but the west end—that part of the track west of the southwest crossing of South Capitol street—while used for shifting purposes when occasion required, was also used for the storage of cars containing coal and other material until such cars could be unloaded.

East of South Capitol street were the "Jersey yards," containing about sixteen tracks (14), which were used for storing freight and passenger cars of all descriptions; for loading and unloading freight, and for the making up trains. In the "Jersey yards" all outbound freight and passenger trains were made up and shifting operations were going on there constantly both day and night.

A little to the southeast of the crossings in question was the engine yard which included the many tracks leading to and from the round-house (14).

West of the crossing were the companies' property yards; their freight station at Ninth street and Maryland avenue; their main passenger depot at Sixth and B streets, and the main lines running south.

Every train of cars made up in the Jersey yards going to the depot, every freight car moving to or from the Ninth Street freight station, every shifting engine passing from the Jersey yard to the depot or to the Ninth Street freight station, and every engine coming from the South or from the Ninth Street freight yard or the Sixth Street depot on its way to the round-house passes over these crossings, and their use for shifting purposes and by empty and loaded cars and engines is almost continuous at pretty much all times of the day and night (19).

On the night of the accident, for some time before midnight, a shifting crew had been, and at the time of the ac-

cident, was, engaged in the Jersey yard in making up trains of passenger coaches for the transportation of troops to the South. In the course of operations it became necessary to "cut out" from among the cars standing on one of the tracks at the eastern end of the Jersey yard a Pullman sleeping car named the "Lylete." On the same track, in front of the Pullman and immediately next to it, was a tourist car. The Pullman car was equipped with what is known as a Janney coupler, while the tourist car was fitted with a Miller coupler. These couplers were both of what is known as the automatic type, but were of different patterns and not designed to couple together. To draw the two cars out on the "ladder" track, an ordinary link-and-pin coupling was made between them—that is, ordinary coupling pins were inserted in the holes made for such purpose in each coupler, and the pins were connected with a coupling link. Owing to the difference in height from the ground of the two automatic couplers, the link was slipped over the top of one coupler while it was put in the slot provided for it in the other (6).

On drawing the cars out of the side track a slacking or running together of the draft of cars occurred, which caused the link to twist over the head of one of the pins, as a result of which the cars parted, and the Pullman car, being the last car of the draft, began to move down the slight grade on the "ladder" track towards South Capitol street crossing. At the time the car broke away it had a light in each end and was equipped with the usual brakes. One of the brakemen had tried the brakes on the car before it was pulled out on the "ladder" track, and they then appeared to work all right (13); but after it became detached from the other cars and started down the grade, the brakes would not hold (13).

Members of the train crew attempted to put on the brakes at both ends of the car, but finding that they would not respond, and that the momentum of the car was increasing, they jumped off and followed it down to the crossing at South Capitol street. The car ran a little over a hundred yards (8), possibly 125 yards, passed over both crossings, and was brought to a standstill west of the southwest crossing by running into two flat cars containing stone or gravel, which were standing on the western end of the "ladder" track (8).

A passenger engine, referred to in the testimony as "Fenton's engine," was standing upon the most northerly of the four tracks at the southwest crossing and about ten yards west of it (12). This engine was partly on the crossing and about opposite the point where Landrigan was found (15). A train known as No. 78, the midnight passenger express for New York, was due at this crossing about 11.55 p. m. This train passed on the north-bound main track, which was immedialely adjacent to the south or "ladder" track. The runaway car and train No. 78 reached the crossing almost simultaneously, the runaway car having about gotten across when the engine of No. 78 began to cross (16).

AT THE TIME No. 78 AND THE "LYLETE" WERE PASSING OVER THE CROSSING "THE GATES WERE DOWN (CLOSED) ON BOTH SIDES."

At the time of the accident and for about eight years prior thereto, Landrigan had been employed by the defendant The Philadelphia, Wilmington and Baltimore Railroad Company as a machinist and assistant boss at its round or

engine house, which was located near South Capitol and I streets, about two squares southeast of the crossing in question (31). He was a member of the night force, and it was customary for the men engaged in night work to take an hour off for lunch between twelve and one o'clock midnight. At the date of the accident and for several years prior thereto Landrigan lived on the north side of Virginia avenue, northwest of the southwest crossing of South Capitol street. The most direct route from the round-house to his house was up South Capitol street to the southwest crossing, thence across the tracks to the north side of Virginia avenue. On the night in question he left his work at the round-house or machine shops about 11.50 p. m., and a few minutes later, about 12 o'clock, was found near the southwest crossing in an injured condition.

He was lying on the ground between the fence in front of the tool-house "and the outside rail of the 'ladder' track"; immediately before he was seen lying there the coach "Lylete" and No. 78 had passed over the crossing (12).

No eye-witness of the accident was produced nor is any known to exist. There is no evidence in the record tending to show where Landrigan was or what he was doing at the moment of receiving his injuries, nor is there any evidence tending to show whether he was struck by the runaway car or by No. 78. The jury was permitted to assume that he was struck by one or the other.

While lying on the ground at or near the scene of the accident and immediately after the "Lylete" and No. 78 had passed over the crossing, in response to the inquiry,

"How did this thing happen?" the injured man replied, "I came under the gates and something struck me, and a whole string of cars ran over me" (15).

He made no other statement as to the occurrence, but died a few hours afterward from the injuries he had received (22).

At the trial plaintiff admitted "that Landrigan went under the closed safety gates, and stood either on or by the side of the 'ladder' track" (19).

After passing under the gates to reach the south or "ladder" track, Landrigan crossed a clear space of fifteen or twenty feet in width between the gates and the nearest rail—from any point of which he could have had an unobstructed view of the approaching runaway car (18, 27, 29).

The night "was not a clear night nor was it a really dark night—there was no moon and there were a few clouds" (21). The crossing was lighted by street lamps located on each of the four corners, and there were electric lights on both sides of the track (9). The lamp in the dome of the "Lylete" "gave a bright light—you could see it all right," "you could see the light very plainly if you looked at it" (10).

The case was tried by the plaintiff upon the theory that her intestate while standing either upon or by the side of the southerly or "ladder" track was struck and run over by the runaway car "Lylete."

Assuming that defendant's employees had been guilty of negligence in their handling of the "Lylete," plaintiff, to avoid the conclusion, logically resulting from the facts above stated, that the deceased was guilty of such contributory negligence as would prevent her recovering damages for his death, offered evidence tending to prove—

1st. That the south or "ladder" track west of the southwest crossing was seldom used for shifting purposes, being ordinarily used for storing cars; and

2d. That the safety gates at this crossing were generally kept in the down or closed position from 10.30 or 11 o'clock at night until the early hours of the morning without regard to the immediate presence or absence of moving trains or cars, and that persons using the crossing between such hours, whether pedestrians or drivers of teams, were frequently compelled to call to the attendant gatemen to raise the gates when they wished to cross over, or, acting on their own judgment, crossed under the closed gates without such calling out; that her husband, who had been in the habit for several years of crossing the tracks at this point about midnight knew of this method of operating the gates, and that consequently the closed or down gates did not, as to him at least, constitute a signal or warning of a present or imminent danger.

On the first point the evidence was that "the 'ladder' track was a track that was used more or less frequently in shifting operations from one end of it to the other;" on the night of the accident it "had been in use in their shifting operations from about 7 or 7.30 o'clock; in these shifting operations they would go all the way down to the crossing

at South Capitol street if necessary;" witness did not remember having gone "all the way down there that night; but "on other nights they had been in the habit of going all the way and crossing South Capitol street when engaged in shifting operations; cars were sometimes placed on the ladder track west of the crossing to be unloaded or "just to get rid of them for a short while, or they would be put there temporarily during shifting operations" (Motley, p. 9).

"The lead or 'ladder' track is used all the time, backwards and forwards, on week days especially, and very frequently on Sundays for pulling cars in and pulling them out" (Willhoit, p. 15).

Webster testified that he had never seen any shifting or making up of trains on the "ladder" track west of the southwest crossing, but admitted that he had seen cars shifted in there, and that it would be necessary to pull them over this crossing to get them out (17); that the use of this crossing by engines and cars was almost continuous day and night (19). The plaintiff and her brother, Kappel, testified that the rails of this ladder track near the southwest crossing were rusty (23, 31); but Wilkinson never noticed anything unusual in the appearance of the rails of this track—to him "all of the rails looked pretty generally alike" (27). Oeser testified that this end of the track was always filled with coal cars, and Kappel said that he had seen cars on the west end of the ladder track hundreds of times, and knew that they were put in there and pulled out (24). As this track only had an outlet to the east (24), all cars put in and taken out of the west end of it necessarily had to pass over the southwest crossing.

On the second ground the evidence was that in the month of August, 1898, and prior thereto the safety gates at this crossing were generally kept down "after ordinary bedtime," whether trains were passing or not; witness had stood on the side where Landrigan was killed, "and crossed right over without hesitating, because he found that (being down) was the regular condition of the gates, whether a train was passing or not" (Webster, pp. 16, 17).

Story testified that he had been traveling over this crossing in the day and night time for fifteen or twenty years, and would pass there sometimes as often as six or seven times in one night; that during this period he had passed there at night and called the watchman several times to get the gates up. The gates were mostly down all the time when trains were passing; that when he would be going home, somewhere between 12 and 4 o'clock in the morning, *sometimes* the gates would be down and he would have to call the gateman to get past (20); that he usually crossed there in a carriage, and the most trouble he had at night with the gates occurred after 12 o'clock; sometimes they would put the gates down and maybe go to sleep or something like that, and he would have to halloa to get the gates up; that he could clearly say this had happened about a dozen times. He had frequently come to these gates at night, both before and after 12 o'clock, when no trains were passing, and found the gates up, and crossed without any trouble, and he had done this very much more frequently than he had been stopped by the gates being down (20). He had frequently come there after 12 o'clock and found the gates up, and had found them that way very often (21). In response to a question by his own counsel as to whether in passing at night he

found the gates more often down or more often up, he replied, "Well, I found them up, you know, but on a few occasions I found them down—twelve or fifteen times, I recollect"—that is, twelve or fifteen times in the ten years that he had been crossing there (21).

Martin, who had occasion to use this crossing very often both day and night, "always found the gates down at the southwest crossing in the summer of 1898 after 10 or 11 o'clock at night, whether trains were coming or not (25); he mostly approached the gates from the north after about 9 or 10 or along about 12 o'clock;" the gates were always down, and during the fifteen years that he crossed there he had had to wake up the watchman two or three times probably; on other occasions when he would come there he would call to the watchman and he (the watchman) would raise the gates if there was no train coming; he thought it was the custom to leave the gates down, and thought it was a safeguard; he did not know any better then and deemed it a proper thing, because of the small amount of use of that crossing at that time of night, to have the gates raised when anybody wanted to go through if no train was approaching; "if there was any doubt as to whether any train was approaching, the watchman would always call to the watchman on the other side and ask him if a train was coming;" "he regarded these precautions of keeping the gate down at that time of night and of calling to the watchman on the other side to know whether a train was coming or the track clear as a safe and proper thing to do" (26).

Wilkinson testified that he had crossed at this crossing for 12 or 15 years, "and at night-time, after the usual bedtime, the gates were usually kept down, whether trains were com-

ing or not; he often had to ask the man to hoist the gates, and sometimes would have to wake him up; he would approach the gates from the south any time from half past six or seven o'clock on, and usually found the gates down;" "sometimes there would be two or three trains waiting there; sometimes you might find trains passing or that had just passed, and they would then let you through, or maybe they would hold you there until another engine would pass down;" generally he would not stay there, but would go through and take whatever risk attached to it; he had gone under the gates and over the crossing when cars or engines were approaching; he could not say that he has ever come down there and found the gates up when no trains, cars, or engines were moving in that vicinity; and when he found the gates down he would just go under the gate and go on without calling to the watchman to raise the gate" (27).

Oeser testified that "the gates after bedtime were kept down all the time; he never saw the gates up after bedtime except when some one would ask to have them raised; he would very often catch trains at the crossing, they generally made a practice of standing right there or of moving up and down upon that crossing; sometimes there would be no trains there and at other times there would be two or three trains, one right after the other; on four different occasions in the course of eleven years' use of the crossing he had to wake up the watchman in order to get him to raise the gates; the tracks at this crossing were in very frequent use; cars, trains, and engines were crossing up and down those tracks pretty much all the time; the crossings down there are dangerous" (28).

Tripp testified that "in the summer of 1898, including the month of August the gates at this crossing after the usual bedtime were mostly kept down; he has seen them down at 9 o'clock, and presumes they were kept down all night; every time he saw them they were down whether trains were passing or not." "When people approached the crossing at night and wanted to cross, if they were walking, they would generally stoop under the gates and walk across; if driving they would have to holler to the watchman to raise the gates" (29, 30).

Kappel, a brother of the plaintiff, testified that "he had occasion to cross the southwest crossing, at night immediately prior to and about the time of Landrigan's death; the gates as a general thing, in the night-time, were down;" "after eleven o'clock (at night) he generally found the gates down whether trains were passing or approaching or not" (22). Witness was employed on the day force at the defendant's round-house; he had worked on the night force, but not for 2½ or 3 years before Landrigan's death (27).

Over objection of defendant's attorneys witness was then permitted to testify that when he and Landrigan were working together on the night force they "used to go home together for two or three months; the gates were down and they had to crawl underneath the gates to get home; the gates were kept down and they very seldom ever saw the gates up; they crossed the tracks between 12 and 1 o'clock at night and between 6 and 7 o'clock in the morning" (23).

Plaintiff having rested, counsel moved the court to instruct the jury to return a verdict for the defendant, which motion was overruled, and an exception to the ruling hav-

ing been noted (32) the defendant declined to introduce any testimony, and the court submitted the case to the jury upon the following, among other, instructions, to each of which instructions exceptions were duly taken and noted:

"In the absence of all evidence tending to show whether the plaintiff's intestate stopped, looked, and listened before attempting to cross the south track, the presumption would be that he did. But that presumption may be rebutted by circumstantial evidence, and it is a question for the jury whether the facts and circumstances proved in this case rebut that presumption, and if they find that they do, they should find that he did not stop and look and listen, but if the facts and circumstances fail to rebut such presumption then the jury should find that he did so stop and look and listen. In order to justify them in finding that he did not, all the evidence tending to show that should be weightier in the minds of the jury than that tending to show the contrary" (substitute Nos. 1 and 6, pp. 32, 33).

Plaintiff's second and third prayers, which were granted and given by the trial court, were as follows:

"2. The jury are instructed that if they believe from the evidence that the gates at the crossing where the deceased received his injury were generally kept down at night from 10.30 or 11 o'clock until the early morning, without regard to the approach or presence of a car, a train, or trains or locomotives, and shall further conclude from all the facts and circumstances of the case that the deceased had knowledge of that fact, then the circumstance that the gates at the intersection of South Capitol street were down at the time of the accident was not of itself a warning to him of the presence of danger, and contributory negligence cannot be imputed to him from that fact alone."

"3. While knowledge by the deceased of the presence of the Fenton engine on the north track or partly upon the South Capitol Street crossing and the approach of No. 78 upon one of the central tracks at or near the time of the accident might or would indicate the presence of danger on or near those tracks, it is for the jury to determine upon all the facts of this case whether it was a want of ordinary or

reasonable care and prudence upon his part to be upon the south track, at the point upon said last-named track at which they shall find from the evidence the accident occurred" (p. 32).

The trial court refused to grant or instruct the jury in accordance with the following prayers submitted by the defendant, viz:

"1. If the jury shall find from the evidence that at the time the plaintiff's intestate approached the crossing in question the safety gates were closed or lowered and that said intestate went under said gates and stood upon or near enough to the south or 'ladder' track at or near the said crossing to be struck by a passing car and that while so standing upon or near said track he was struck by a car moving upon said track and received the injuries which resulted in his death, then the plaintiff's intestate was guilty of contributory negligence and the verdict must be for the defendant" (33).

"2. If the jury shall find from the evidence that at the time the plaintiff's intestate approached the crossing in question the safety gates were closed or lowered, then they are instructed that the gates so closed or lowered were a warning to all persons approaching said crossing that cars, engines or trains might be expected to pass over and upon all or any of the railroad tracks at said crossing while the gates remained so closed or lowered, and if the jury shall further find from the evidence that the plaintiff's intestate did not heed such warning but went under the closed gates and was struck by a car moving upon one of the defendant's tracks at said crossing and thereby received the injuries which resulted in his death, the plaintiff cannot recover in this action and the verdict must be for the defendant" (33).

"3. If the jury shall find from the evidence that at the crossing in question and on the occasion complained of the defendant maintained four (4) tracks, the most northerly of which was used for the passage of freight trains and for shifting purposes, the most southerly, commonly called the 'ladder' track, being used for shifting trains and storage purposes, and the two intermediate tracks for the general business of the company, and that the defendants also main-

tained at said crossing safety gates operated by a gateman and at the time the plaintiff's intestate approached said crossing on the night of the accident these gates were closed or lowered and a freight or mixed train, with an engine attached, was standing upon the most northerly track on said crossing, and a shifting engine with a train of cars was operating upon said southerly or 'ladder' track in the railroad yards immediately east of said crossing and a regular express train was about due at said crossing, then the jury is instructed that said gates were closed or lowered for all trains, cars, or engines which were moving or passing or which might move or pass upon all or any of said tracks at said crossing and were a warning of danger which the plaintiff's intestate was bound to heed, and if the jury shall find that the plaintiff's intestate met his death by going under said gates and upon or so near to one of said tracks as to be struck by a car moving on said track, he was guilty of negligence contributing to the accident, and the plaintiff cannot recover in this action" (33).

"6. The jury are instructed that no evidence has been submitted in this case upon which they would be justified in finding the existence of any usage or custom to keep the crossing gates at the crossing in question lowered from 10.30 or 11 o'clock in the evening until an early hour in the morning irrespective of the passage of trains, cars, or engines" (35).

"11. It appearing from the uncontradicted evidence in the case that the defendants maintained at all hours of the night a gateman in charge of the gates at the crossing in question who raised and lowered said gates as occasion might require, and it further appearing from such evidence that such gateman was accustomed to open or raise said gates for the passage of pedestrians or vehicles when it was safe to do so, and it further appearing that the crossing in question being adjacent to the shifting, storage and engine yards of said defendants and between such yards and their passenger and freight stations in the city of Washington and that the main tracks leading to and from said station also passed over the same, said crossing was an especially dangerous place, the jury are instructed that in the absence of any evidence tending to show that the plaintiff's intestate, upon approaching said crossing and finding the gates be-

tween him and the tracks lowered or closed, made any request of the gateman to raise or open the same or submitted any inquiry as to whether any engines, cars or trains were approaching said crossing before he went under said gates and entered upon the crossing within the same and thereby received the injuries which resulted in his death, said intestate was guilty of negligence directly contributing to his own misfortune and the plaintiff cannot recover" (35).

And to the refusals to grant each prayer, exceptions were duly and seasonably noted (35).

The court, at the instance of defendants, then instructed the jury as follows:

DEFENDANTS' 7TH PRAYER.

"The jury are instructed that there is no evidence in this case from which they would be justified in finding that the lead or ladder track at the point near which the plaintiff's intestate was injured was an unused track, but on the contrary, as the undisputed evidence shows, said track was used at irregular intervals, more or less, and such use made it incumbent upon the plaintiff's intestate to exercise due care and caution, under all the circumstances, before attempting to cross the same, and if the jury shall find that plaintiff's intestate did not use such due care and caution and did not look and listen with attention for any train or car that might be approaching on said track, and that his failure so to do contributed to his injury, then their verdict should be for the defendant."

DEFENDANTS' 8TH PRAYER.

"The jury are instructed that unless they are satisfied from the evidence that the plaintiff's intestate was injured by being struck and run over by the Pullman car which was moving on the south or 'ladder' track at the crossing and on the occasion in question, then their verdict should be for the defendant."

ASSIGNMENTS OF ERROR.

The trial court erred :

1. In refusing to direct a verdict for the defendants.

2. In refusing to charge the jury as matter of law that the closed or down safety gates at the crossing on the occasion in question constituted a notice or warning to all persons approaching the same that the defendants were about to use some or all of the tracks at the crossing for the purposes of its business, and as it was conceded that the deceased had knowingly and deliberately disregarded such notice and had brought upon himself the injuries which resulted in his death by going under said gates and negligently standing upon or near one of defendants' tracks then in use, the plaintiff could not recover.

3. In granting the plaintiff's second prayer (32, 38), which instructed the jury that if they found that the gates were generally kept down from a late hour at night until early in the morning, and that the plaintiff's intestate had knowledge of that fact, then the fact that the gates were down at the time of the accident was not of itself warning to him of the presence of danger.

4. In leaving it to the jury to say that the deceased was injured by the "Lylete," there being no evidence from which it could be reasonably found that he was injured by that car rather than by the express train No. 78.

The only evidence on this point was Kappel's statement

that after the accident he saw blood "and a little proud flesh right alongside the south track, which is called the ladder track" (21), and the deceased's own statement that "*a whole string* of cars ran over me" (15).

5. In charging the jury that in the absence of all evidence tending to show whether the deceased stopped, looked and listened after passing the closed gates and before attempting to cross defendants' tracks, the presumption was that he did so, the undisputed evidence bearing on that point being that a person standing on the clear space between the gates and the outer rail of the south track would have had an unobstructed view to the east for a distance of about 100 feet or more (29, 27); that the advancing end of the runaway car was furnished with a lighted lamp which gave forth a bright light (10, 14), and that a man "standing on the track some distance from the advancing end of a car showing such a light could see the illuminated end of the car," and "if he were looking up the track he could see the car if he were not too far away" (30).

ARGUMENT.

It may be noted at the outset that the particular acts of negligence with which defendants were charged and which were alleged to have brought about Landrigan's death were:

a. That defendants' negligently, carelessly, and improperly coupled together their cars;

b. That they negligently, carelessly, and improperly failed to furnish and equip said cars with safe and efficient brakes; and

c. That they negligently, carelessly, and improperly failed to give any notice or warning of the movement of said cars by having or keeping a light or lights upon the ends of said cars or by the ringing of bells or blowing of whistles, or by giving other signs, notices, or warnings.

It being specifically alleged that the deceased, while in the act of crossing said railroad track, as he had a right to do, exercising due care, "was thrown down and run over and killed by one of said cars, being shifted as aforesaid, breaking loose and running back upon him without notice or warning."

The evidence, all of which was adduced by the plaintiff, was, as to point a, positive that the coupling used on the occasion in question "was a very ordinary coupling and is made right along;" witness had "never seen it break loose before;" "it was customary to couple cars by putting the link on top instead of through the slot" (7); that two Janney or two Miller couplers will couple together without requiring the use of a link and pin, but a Janney and Miller coupler will not couple of themselves, and "you have to use a link and pin to couple them" (8). In shifting operations in the yard different kinds of cars would be handled, and "it was an ordinary occurrence at that time in the yard to couple cars up with Miller and Janney couplers on them;" "they must be coupled by putting a pin in the Janney and another pin in the Miller and connecting the two with a link; this is the ordinary way of coupling two such cars, and the only way the witness knew to couple them" (9); "the coupling was safe enough to pull the car out of the yard, and that was all that was wanted; it did not do it that night because it broke loose; the couplings 'slipped around'

when they were going around the curve, and that had a tendency to make them come apart." Witness supposed "it was due to the slack caused by coming over the switch on the ladder track" (10, 11). "It is impossible to couple a-Miller and a Janney together; it was on a curve, and there fore they used a link and pin: it was a secure coupling to pull the car around in the yard, but it was not a safe coupling to run over the road; it was sufficient for the yard and was very frequently done" (12, 13).

As to point *b* the evidence was that one of the shifting crew, Willhoit, "when they were pulling the car out on the straight track tried the brake and it appeared to be all right;" when the cars parted he "called for Wilber to help him put the brake on and they did all they could to stop the car, but the car had got too much start; the brake seemed to work all right—he did not have any fault to find with the brake, only the car had gotten too much start; the brake did not do any good because the car had too much start; you sometimes apply a brake and it does not 'take up' right at first" (13).

As to point *c* it was conceded that the safety gates at the crossing were down; that no one could get by them without going under them; that the deceased did go under them; that after passing the gates, and before reaching the tracks, he had an unobstructed view to the east (18); that the advancing end of the Lylete was illuminated by a brightly burning lamp in the dome of the platform (10), and that deceased could have seen the car at a distance of 100 feet or more (29) if he had looked that way.

Testing plaintiff's specifications of negligence by the evidence adduced in support of them, wherein had the defendants failed in their duty towards the public in general or the deceased in particular? The point of accident was one of extreme and ever-present danger; it lay at the throat of the main shifting yard of the defendant in this District and between that yard and the company's freight station and main passenger depot. It was in almost constant use both day and night by passing engines, cars, and trains; each of the four tracks which crossed it were "live" tracks, being used for railway purposes as occasion required. The deceased was a railroad employee and thoroughly familiar with the crossing and its use by the defendants. No one knew its attendant and ever-present dangers better than he and no one better than he knew the significance of the silent but commanding protest emanating from the closed gates. He elected to disregard their warning. The presence of Fenton's steaming engine standing in his path, the roar of No. 78, the approaching express train eastbound, the prevalence of busy, shifting engines, and the possibilities of shunted or drifting cars held no terrors for him. On the distant side of the tracks beyond the safety gates barring his approach, and proclaiming the presence of danger, lay his home and a midnight lunch; impatient appetite overcame discretion. Disregarding all warnings, self-confident, and disdainful of dangers long familiar, refusing to delay, he took the risks incident to immediate crossing and sacrificed his life.

There was no allegation in the declaration that the gates at this crossing were improperly managed or operated or that the defendants or any of their officials had notice of

that fact, if it was a fact. The defendants were not put upon notice that they would be called upon to meet such a charge, and it was clear error on the part of the trial judge to submit to the jury evidence which had no bearing on the issues presented by the pleadings.

But apart from this how could the fact that the gates may have been frequently lowered when no train or car was actually at or on the crossing excuse the deceased or avail the plaintiff when it appears that on the occasion of the accident and when the deceased violated the warning of the gates not to approach the crossing three of the four tracks which lay across it were being immediately and actively used by moving cars and trains.

What was the direct and proximate cause of the injury to the deceased? Did it arise from the negligence of the defendant's employees, or was it the immediate result of a voluntary exposure of himself to a peril which a cautious and prudent man could and would have avoided? Did it not directly follow a refusal to be bound or influenced by well-known and easily understood warnings of danger and an exhibition of recklessness and want of care too flagrant to be condoned?

The question which should have been made controlling by the trial court and which is the real point for argument here is as to the contributory negligence of the deceased himself. Upon the facts disclosed by this record the law would seem to be well established. The crossing gates were closed and approach to the tracks effectively barred. The tracks at the crossing were in active and present use for railway purposes, both in the passage of trains and in shifting operations. The deceased, scorning the closed gates,

pressed under them, heedless of perils that would have deterred the bravest of men, without pausing or looking, for if he had paused, or even looked without pausing, he would have seen the lighted car approaching on the track nearest to him. He stepped upon the track and either stood on it or so near to it that he was struck and run over either by the "Lylete" or train No. 78. In either event the plaintiff was where he had no business to be at that time, and the defendants, having given to him full warning of his danger, were rightly using both the crossing and its tracks in the proper conduct of their business. It was conceded on the trial, and the trial judge so charged, that if the deceased was injured by coming in collision with No. 78, plaintiff could not recover; but it was left to the jury to guess, for there was no evidence from which it could be found that he was injured by the "Lylete." On principle it must also be conceded that if defendants' employees in the course of their shifting operations had intentionally backed the "Lylete" upon and over the crossing and in so doing had collided with and injured the deceased, plaintiff could not have maintained this action. How, then, can defendants be held liable to respond in damages for doing unintentionally that which they would have been free to do intentionally without liability, all preliminary precautions being taken in each instance?

In the case of Stewart *vs.* Washington and Great Falls Railway Co., decided by the Court of Appeals of the District of Columbia November 4, 1903, in the opinion of the court by Alvey, Chief Justice, it was said:

"With respect to the alleged negligence on the part of the defendant company, a careful examination of the evidence

contained in the bill of exception has brought us to the conclusion that the court below committed no error in directing a verdict for the defendant. There is no sort of ground shown for contending that there was negligence on the part of the motorman or conductor in running the car at the time and place where the accident occurred. They were acting strictly within the line of their duty, and did nothing of which the plaintiff could justly complain. Indeed, we do not understand that there is any attempt to impute negligence to them. And it is conceded that the defendant company had full control and right to run their cars over their railroad at such time, and over such of their tracks, as they might deem it necessary for the execution of their work; and that it was no violation of duty to any one to run their cars upon one track rather than another, where the exigency or convenience of the service undertaken by them rendered it proper, in their judgment, so to do. In operating a double track railroad the owner is bound by no rule that requires that he shall use the right-hand track for the running of cars in one direction, and the left-hand track for the running of cars in the reverse direction. He may run his cars on both tracks in either direction, as the needs of the business may require. But it is contended that if there be change made in the operation of a railroad, either as to the time of running, or the change of direction of trains on several tracks, there should be notice given of such change to employees and others concerned, so that they may pursue their course accordingly. This would certainly be an unusual requirement, and one that might be very embarrassing in the operation of a railroad on important occasions. All parties coming in contact with the operation of a railroad must be presumed to know that the owner has entire control and direction of the course and manner of operation, and so long as there be no contractual obligations or public duties violated, the owner must be allowed to exercise his own judgment and discretion in the use of his property."

In that case the plaintiff, an employee of the defendant, while going to his place of duty, walking along the defendant's tracks, was struck and injured by one of defendant's

cars then being propelled along that track in a direction opposite to that in which it was customary to move cars over it.

In negligence cases the distinction between remote and proximate causes is recognized and carefully defined.

Whenever two acts or causes unite to produce a given result involving a damage, the controlling cause, if any, is regarded as the proximate cause, though it may be the further removed in point of time.

But where the two causes are separate and independent, then that cause which is the nearest in point of time to the exposure is regarded as the proximate and direct cause, and the other as secondary and remote.

Insurance Company *vs.* Boon, 95 U. S., 130, 131.
Scheffer *vs.* Railroad Company, 105 U. S., 249.
W. & G. R. R. *vs.* Hickey, 166 U. S., 528.

In the case of Cullen *vs.* Railroad Company (8 D. C. Appeals, 69), which possesses many points of similarity to the case at bar, a boy after running around the closed gates of the defendant company, in attempting to cross the tracks, stumbled in a hole in the planking between the rails and was knocked down and run over by an engine of the defendant. It was claimed that the defendant was negligent in allowing the hole to remain in the crossing, in not giving notice of the approach of the engine, and in the failure of the engineer to keep a lookout ahead. But the court said that all of these acts of negligence had occurred before the exposure of the deceased to danger and afforded no excuse

for his contributory negligence. The following extract from the opinion of the court is particularly applicable:

"The acts of negligence on the part of the defendant relied upon in this cause to relieve the deceased from the consequences of his own contributory negligence, are the primary and only acts of negligence charged against the defendant in the first instance, namely, the absence of a fence, an unlawful rate of speed, and the fact that the engineer was not looking in the proper direction. These had all supervened before the exposure of himself to danger by the deceased; and it seems to us that it would be a perversion of the law of negligence to hold that, because they were continued after the deceased had exposed himself to danger and without the occurrence of anything which would give notice or knowledge of such exposure, yet the fact of the exposure changed the character of the defendant's action from negligence to recklessness" (Op., p. 74).

Assuming for the argument that the defendants had been proven guilty of the negligencies charged in the declaration, it is submitted that they had all supervened before the voluntary exposure by the deceased of himself to the obvious dangers.

So far as we are advised, the decided cases are an unit in deciding that it is negligence *per se* for a wayfarer to disregard the warning given by down or closed gates at a railroad crossing.

Such conclusion is the natural and seemingly inevitable corollary of that other principle, now so well settled as to be no longer disputable, that to one about to cross at a railroad crossing, in the absence of an obvious danger, open or uplifted safety gates are an invitation.

In an action against a railway company for injuries received at a grade crossing, where it appeared that plaintiff's intestate attempted to cross the tracks at night after the gates had been lowered, the supreme judicial court of Massachusetts held that intestate's contributory negligence barred recovery by his personal representatives, as railroads from the necessity of the case have the right to the exclusive use of grade crossings when their trains are passing, it being their duty to give suitable warning of such passing trains to travelers upon the highway. If they do this and the traveler disregards the warning, and insists upon crossing, he does so at his own risk. The court said:

"In this case the intestate was warned by the lowered gates that it was dangerous for him to cross the track, and it was his duty to wait until the gates were raised; he voluntarily entered upon the track notwithstanding the warning and without excuse. This negligence on his part caused the accident, and the consequences of his rashness cannot be visited upon the defendant. *It is no answer to say that he may have supposed that the gates were down because a particular freight train was passing*, and he was willing to take the risk from that. He had no right to suppose so. It was negligence for him to enter upon the track when he was warned that the railroad required the exclusive use thereof."

Granger *vs.* Boston & Albany R. R. Co. (Morton, C. J.), 146 Mass., 276.

See also Allerton *vs.* R. R. Co., 146 Mass., 241.

Schmidt *vs.* Phila. & Reading R. R. Co., 149 Pa. St., 337.

Where a train at dusk was waiting on a certain track, and a man intending to become a passenger thereon disregarded closed safety gates, and while crossing an intermediate track was injured by another train running without a headlight, it was held that his contributory negligence barred his re-

covery, and a nonsuit granted on the trial was affirmed on appeal.

Debbins *vs.* R. R. Co., 154 Mass., 402.

Where a child of eleven years attempted to cross several *railroad tracks at a street crossing where safety gates were* closed and was killed in the attempt, her personal representatives, seeking to recover for her death, were nonsuited on the trial, and this action of the trial court was affirmed by the appellate court on appeal, that court holding that a railway company has the right to the exclusive use of a crossing when its trains are passing thereon, and if it gives a warning of such use which the traveler disregards he does so at his own risk. Lowered gates over a crossing are a sufficient warning, and if they enclose several tracks no one has a right to suppose that they are lowered merely because of a switching engine then in sight. In the case at bar the child being familiar with the crossing and using it several times a day, the only proper inference is that she understood and took the risk.

Marden *vs.* Boston & Albany R. R. Co., 159 Mass., 393.

Persons who disregard the warning of safety gates when the same are being lowered and receive injury thereby are guilty of contributory negligence barring their recovery.

Peck *vs.* R. R. Co., 50 Conn., 379.

If a driver approaching a crossing is warned by a flagman to stop, and in disregard of such warning he goes forward

and is injured, he is barred from recovery by contributory negligence.

B. & O. *vs.* Colvin, 118 Pa. St., 230.

Where safety gates which covered the driveway of a street, but not the footway, were down, and a pedestrian, familiar with the crossing, attempted to cross and was killed by a train backing, which gave no signal, and the view of which was impeded by other cars, a nonsuit was entered by the trial court for contributory negligence in disregarding the lowering of gates over the driveway. On appeal this action of the court was affirmed, it being held that the gates were a warning to foot passengers as well as to vehicles, and *when they were down they were down for all trains moving or passing at the time and not on account of a particular train.*

Cleary *vs.* R. R. Co., 140 Pa. St., 19.

Safety gates at a railroad crossing over a city street are a warning of the passing of trains, not only to vehicles, but also to pedestrians, and if in disregard thereof a pedestrian passes a closed gate in broad day, enters upon a crossing, and while watching one train is struck by another, his contributory negligence will prevent a recovery. "In the case at bar a train was approaching, the gates were down as they should be, and the plaintiff was thereby warned of danger. *It was a matter of no moment whether the gates were always down or not.* In this particular instance the gate was down and the defendant discharged its duty in that regard. If the plaintiff had performed his duty he would not have been injured."

Sheehan *vs.* R. R. Co., 166 Pa. St., 354.

A pedestrian came to a crossing as the safety gates were being lowered thereon and an approaching train was in sight. He ran under the gates and crossed the track in safety before the train and turned to watch its passage. While so engaged he was killed by another train suddenly coming around a curve. On the trial a verdict for the defendant company was directed by the court because of contributory negligence in the plaintiff's intestate, and this direction was affirmed on appeal.

Duvall *vs.* Mich. Cent. R. R. Co., 105 Mich., 386.

When a man familiar with the place attempted to cross at night tracks when safety gates were closed, and while avoiding one train was struck by another backing up without a light or man on its approaching end to give warning, and although many persons customarily made similar crossings when these gates were down, plaintiff was nonsuited at the trial for contributory negligence, which action was affirmed on appeal, the appellate court holding that where safety gates are maintained at city crossings it is the duty of travelers, observing that the gates are down or about to be let down, to stop until they are raised before proceeding. The presence of the gate across the street says to the traveler in a manner not to be misunderstood that such tracks are to be presently used for the passage of trains. The track itself is a general notice of danger calling upon the traveler to look and listen for approaching trains; but the presence of the gate across the highway is more. It is a specific notice that the danger of going upon the track is immediate, and that no person of ordinary care should assume it without expecting to take all the risks upon himself. It is no excuse for

disregarding such warning that persons were accustomed to cross at that place when the safety gates are down, for the doing of an act so obviously dangerous constitutes negligence as a matter of law, regardless of custom.

Douglass *vs.* R. R., 100 Wis., 405; 76 N. W., 356 (1898).

In Railway Company *vs.* Schneider, 45 Ohio St., 678, which related to a fatal injury at a grade crossing, the deceased was held not to have been guilty of contributory negligence, because "an open gate with a gateman in charge is notice of a clear track and a safe crossing," and "it is not negligence in the persons approaching to pass to the track through the open gates without stopping to listen."

In Railway Company *vs.* Ehlert, admr., 63 Ohio St., 320, 326, where the deceased met his injuries by going upon the tracks in spite of the closed gates, the court, referring to the Schneider case (*supra*), said:

"The rules by which liability is determined are to be applied impartially." "In such circumstances the company cannot be held liable because it does not give the warning which its obvious preparation authorizes the public to expect, and liable as well, although it gives the warning." "The allegation that the gate was lowered across said street for the passage of a long freight train" indicates a misconception of the significance of closed gates. They signify that the space between them, whether occupied by a single or a double track, is for the time being, to be used exclusively for the passage of trains. It would not be practicable to give separate warnings for

each track, nor is there any necessity for such warning. The conclusion reached in Railway Co. *vs.* Schneider, *supra*, was justified by the object of diminishing the frequency of collisions at grade crossings. That object will be promoted by requiring persons approaching such crossings to heed the warning when it is given."

The Court of Appeals of the District of Columbia in the case at bar announced an extraordinary view of the effect of closed safety gates at railroad crossings. In its opinion (Record p. 61), the court says:

"Deceased was familiar with the crossing and the gates gave him no notice of anything that he did not know in respect of the number, proximity and *use* of the tracks."

The obvious deduction from such assertion being that the deceased was at liberty to put his personal knowledge and past experience against the warning conveyed by the closed gates and to decide for himself, with full reservation of the liability of defendants to make good any damages which he might suffer in event of deciding wrongly, whether he would pass the gates and cross the tracks or not.

Such argument and deduction must be wholly fallacious and without foundation in right reason, or recognized law. If permitted to prevail, the maintenance and operation of safety gates at railroad crossings would be robbed of their proper effect and results. If one approaching a railroad crossing is at liberty to rely upon his own knowledge, real or imagined, of the course of operations there and the dangers to be encountered in then crossing the tracks and without being guilty of contributory negligence may disregard closed gates and other recognized signals of danger at such points,

we would have the anomaly in law of a railroad company free to conduct its business and move its cars and trains over its tracks as its needs or business required, with full liberty, while exercising care and proper caution, to change its schedules and its course of operations as and when it saw fit and without previous notice to the public, closing its crossing gates as a warning to persons in the vicinity that it had need of and was about to use the tracks inclosed thereby, and yet each individual approaching the tracks left free to decide for himself whether it would be safe for him to go under the gates and cross the barred tracks, and, having decided to cross, in the event of injury, such individual would be held to have been free from fault, because, forsooth, prior to the fatal day he had observed that the railroad company was accustomed to use such track only in a particular manner or at certain hours.

Such a rule must result in permitting each individual approaching a railroad crossing to determine for himself his legal duty in the premises irrespective of closed safety gates or other signals or warnings of danger, and would make the maintenance and operation of such safeguards but an useless expense.

Our fifth assignment of error is based upon the refusal by the court to give the defendants' fifth prayer (34, 35) and the giving of the court's substitute for the plaintiff's first and sixth prayers (32, 39).

The defendants' fifth prayer was as follows:

"5. The jury are further instructed that there is no presumption of law that the plaintiff's intestate did so look and listen before going upon or dangerously near to the

tracks at the crossing and on the occasion in question, but on the contrary the law requires that this precaution on the part of the plaintiff's intestate shall be fully established to the satisfaction of the jury by a fair preponderance of the evidence in the case, and the jury are instructed that there is no evidence in the case from which they can find that said intestate did so look and listen" (34, 35).

The court's substitute for the plaintiff's first and sixth prayers was as follows:

"In the absence of all evidence tending to show whether the plaintiff's intestate stopped and looked and listened before attempting to cross the said south track, the presumption would be that he did. But that presumption may be rebutted by circumstantial evidence, and it is a question for the jury whether the facts and circumstances proved in this case do rebut that presumption, and if they find they do they should find that he did not so stop and look and listen, but if the facts and circumstances fail to rebut such presumption, then the jury should find that he did so stop and look and listen. In order to justify them in finding that he did not, all the evidence tending to show that should be weightier in the minds of the jury than that tending to show the contrary" (32, 39).

There was no affirmative evidence tending to show that the deceased looked and listened either before passing the gates or on nearing the tracks. The negative evidence was that the night was neither dark nor yet light; there was no moon and there were some clouds; the crossing was well lighted by both gas and electric lights; the view of one approaching the tracks while crossing the space between the gates and the first rail of the south track was unobstructed; the car "Lylete" was moving along that track from the east towards the west; its advancing end was well lighted and the light could have been seen for an hundred feet or more by any one who looked up the track towards it.

Either Landrigan did not look or, having looked, he disregarded what he saw. In explaining the occurrence he made no mention of having looked up and down the tracks before venturing upon them, and if his statement is to be accepted at all, and this cannot be denied, it should be accepted as conclusive, and the case should also have been taken from the jury on this ground, for by his reference to "a whole string of cars" he must have meant the express train No. 78, and it was conceded that if he was injured by that train he could not recover.

If he did not look and listen before attempting to cross the tracks, or if he looked and failed to heed the warnings of his senses, he was guilty of such contributory negligence as will prevent plaintiff from recovery here.

"Judging from the common experience of men, there can be but one plausible solution of the problem how the collision occurred. He did not look, or if he did look he did not heed the warning and took the chance of crossing the track before the train could reach him. In either case he was guilty of contributory negligence."

Northern Pacific R. R. Co. *vs.* Freeman, 174 U. S., 384.

"When to look is to see, the simple utterance that one did look and could not see will be disregarded as testimony by the court."

Hook *vs.* Mo. Pac. Ry. Co., 63 S. W. R., 360.
21 A. & E. R. R. Cas. (N. S.), 787.

The true rule in cases of this character is that there is no presumption of law either way or in favor of either party.

"If a traveler by looking, could have seen an approaching train in time to escape, it will be presumed, in case he is injured by collision, either that he did not look, or, if he did

look, that he did not heed what he saw. Such conduct is held negligence *per se*."

Beach on Contributory Negligence, sec. 182.

"The law will not presume that a plaintiff has been negligent, in the absence of some evidence tending to show it; but when his evidence tends to create the presumption, then he must rebut the presumption by sufficient proof to produce a belief in the minds of the jury that negligence on his part did not in fact exist."

Mo. Pac. R. R. Co. *vs.* Foreman, 73 Tex., 311.

In many jurisdictions, like Maryland, where it is held that, in the absence of all evidence, it will be presumed that the decedent exercised reasonable care, it is said to be error to give an instruction like that here complained of, where there is any evidence from which it might be inferred that such care had not in fact been exercised.

In the case of Philadelphia, Wilmington and Baltimore R. R. Co. *vs.* Stebbing, 62 Md., 504, the court of appeals of Maryland held that it was error in that case to instruct the jury that they might "infer the absence of fault on the part of the plaintiff from the general and known disposition of men to take care of themselves, and keep out of the way of difficulty and danger."

In passing upon this instruction, Chief Justice Alvey said:

"With respect to the fourth prayer of the plaintiff, which was granted, in view of the facts of the case, we think it ought to have been refused, or if granted at all, it ought to have been in a modified form, to avoid the possibility of misleading the jury. It is certainly true, the motive to self-preservation is a principle of our common nature, and it is but rational to presume, in the absence of evidence to the contrary, that parties act under its promptings in view of impending danger. But, in such cases as the present, there

is a counter-presumption, when the proof does not show to the contrary, and that is, that every person charged with a duty involving the safety of himself or others, will perform that duty; so that in fact it is not often the case that these mere presumptions afford much assistance in arriving at correct or just conclusions. They ought not to be indulged to the exclusion of direct evidence to the contrary; and it is only where there is no reliable proof to the contrary, or there is rational doubt upon the evidence as to the acts or conduct of the parties, that such presumptions can properly be invoked. The jury ought not to be instructed in such terms as would justify them in acting upon the mere presumption of the absence of fault in either party, in disregard of the proof in the case, where there are facts and circumstances to be considered by them. The form of the instruction in this case is the same as that used in several cases that have come before this court, and where the instruction has been sanctioned; but the propriety of such instruction must always be determined with reference to the nature and state of the proof before the jury. It will not do to instruct them that it is competent for them, in connection with the facts and circumstances of the case, irrespective of the nature and force of such facts and circumstances, to infer the absence of fault on the part of either plaintiff or defendant, *from the known general disposition of men to avoid danger.* Such an instruction in many cases would be exceedingly misleading; and, we think, it was error to give it in this case in the form in which it was given."

And in the case of Texas and Pacific Railway Co. *vs.* Gentry, 163 U. S., 353, where no one personally witnessed the crossing of the track by the deceased, nor the running of the flat car over him, this court said per Harlan, J.:

"Manifestly it was not the duty of the court, when there was no evidence as to the deceased having or not having looked and listened for approaching trains before crossing the railroad track, to do more, touching the question of contributory negligence, than it did, namely, instruct the jury generally that the railroad company was not liable if the deceased by his own neglect contributed to his death, and that they could not find for the plaintiff unless the death of

the deceased was directly caused by unsafe switching appliances used by the defendant, and without fault or negligence on his part."

And so in the case at bar the trial judge should at least have contented himself with giving the ordinary instruction as to contributory negligence. The jury should not have been instructed in such terms as would and did justify them in acting upon mere presumption when there were facts and circumstances bearing upon the point to be considered by them. It was error to instruct them, in the face of the decedent's own narrative of the occurrence and the undisputed evidence that if he had looked he would have seen the approaching car, that they were free to assume that deceased had looked and listened from the known disposition of men to avoid danger.

One is not entitled to say that he was injured by the negligence of another if he, by the use of ordinary care, might have escaped the damage.

Davey *vs.* London & S. W. Ry. Co., 12 Q. B. D., 70 (1883).

Wakelin *vs.* London & S. W. Ry Co., 12 App. Cas., 41 (H. L. 1886).

The last case was one in which the dead body of a man was found at night near a level crossing, but there was no evidence of the circumstances surrounding his getting on the line. The mere omission to whistle was held not evidence of negligence causing the accident.

In the course of his opinion, Lord Watson said:

"I am of opinion that the onus of proving affirmatively that there was contributory negligence on the part of the per-

son injured rests, in the first instance, upon the defendants, and that in the absence of evidence tending to that conclusion the plaintiff is not bound to prove the negative. * * * In the course of the trial the onus may be shifted to the plaintiff so as to justify a finding in the defendant's favor to which they would not otherwise have been entitled."

In the case of the Bernina (1887), 12 Probate Div., 58, Lord Justice Lindley, giving a neat classification of the various kinds of negligence cases, divides his third class, viz., where A is injured by B by the fault, more or less, of both combined, into three subclasses, the third of which is where there has been as much want of reasonable care on A's part as on B's, and says:

"In such a case A can not with truth say that he has been injured by B's negligence, he can only with truth say that he has been injured by his own carelessness and B's negligence, and the two combined give no cause of action at common law."

In Sewall *vs.* N. Y., N. H. & H. R. Co., 171 Mass., 302, the plaintiff, a boy thirteen years of age, while riding a bicycle ran into defendant's train at a railway crossing. He was familiar with the crossing, but paid no attention to it and did not look out for the cars, but looked elsewhere. It was held that a verdict was properly directed for the defendant. The opinion cites other pertinent cases bearing on the point.

In Grand Trunk Ry. Co. *vs.* Ives, 144 U. S., 408, this court said:

"Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured."

In conclusion, it may not be amiss to quote an extract from the opinion of this court in the recent case of Patton *vs.* Texas & Pacific R. Co., 179 U. S., 658, per Brewer, J. There the injury was to an employee. In such a case, says the court:

"The fact of accident carries with it no presumption of negligence on the part of the employer; * * * it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

It is submitted that the judgment of the Court of Appeals of the District of Columbia should be reversed and that court instructed to reverse the judgment of the supreme court of the District and to remand the case with instructions to set aside the verdict and to grant a new trial.

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Supreme Court of the United States

OCTOBER TERM, 1894.

No. 71.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY AND THE PHILADELPHIA, WILMINGTON AND BALTIMORE RAILROAD COMPANY, PLAINTIFFS IN ERROR,

v.

CATHARINE LANDRIGAN, ADMINISTRATRIX OF THE ESTATE OF THOMAS J. LANDRIGAN, DECEASED, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

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BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF FACTS.

This was an action below by the defendant in error, administratrix of Thomas J. Landrigan, her deceased husband, to recover damages against the defendants for the negligent killing of the said Landrigan on August 29, 1898, at the intersection of Virginia avenue and South Capitol street, in the city of Washington.

The decedent was a machinist employed at the roundhouse of the defendant on South Capitol street, south of the

intersection in question. His hours of work were from 6 p. m. to 7 a. m. every night, with an allowance of one hour, from 12 to 1 o'clock, at which interval it was his habit to go home to lunch, his home being situated on Virginia avenue southwest, north of the intersection in question, requiring him to cross the railroad tracks of the defendants at that point. South Capitol street, at its intersection with Virginia avenue, is divided by a parking or reservation in its center about 50 feet in width, thus making two crossings, a southeast and a southwest crossing (Rec., pp. 10, 16). Along Virginia avenue, at this intersection, the defendants maintained four tracks, running east and west, the first track on the south being known as the ladder or "lead" track, the track immediately north of it being the north-bound main track, the next track to the north being the south-bound main track, and the fourth or most northerly track being called the reservation or freight track. The ladder track extended westwardly from the crossing to an alley, and eastwardly of the crossing it extended to K street southeast. The round-house was a little to the south and east of the crossing. East of the South Capitol Street crossings were the "Jersey yards" of the company, all of the tracks in which were connected by switches with the ladder track, from which circumstance it derived its name of the "lead" or ladder track.

The ladder track, as stated, extends west of the South Capitol Street crossing to an alley and stops at its end at what is known as the property yard, where coal, ties, iron, and other commodities are stored for the use of the plaintiffs in error (Rec., pp. 8, 16). It was called the "blind" (Rec., p. 16) or "dead" track, because it does not lead anywhere in that direction (Rec., p. 17), having no outlet except to the east (Rec., p. 24). The portion of this ladder track lying west of the crossing was used for storing freight cars, but not passenger coaches (Rec., p. 8), and, as stated, for conveying coal, ties, iron, and other commodities to the com-

pany's property yard, no portion of this track lying west of the crossing being used for shifting or making up trains (Rec., pp. 17–23). It runs "down grade" from east to west across South Capitol street (Rec., p. 6).

At each of the two South Capitol Street crossings the defendants maintained guard or safety gates. At the southwest crossing, where Landrigan was killed, the distance from the gates to the southernmost rail of the ladder track was about 15 feet (Rec., pp. 16–22). The safety gates, at this point, were generally, if not always, kept down or closed after ordinary bedtime, from 10 or 11 o'clock at night, until the next day, regardless of the fact whether trains were passing or not (Rec., pp. 16, 17, 25, 27, 28, 29, 30); and although a watchman or gateman was supposed to be stationed there in charge of the gates, persons with vehicles found it necessary to request him to hoist the gates, and sometimes to wake him up out of sleep for the purpose in order that they might pass (Rec., pp. 27–30). After bedtime the gates were up only when some one asked to have them raised (Rec., p. 28).

At the time of the accident, a train of tourist or passenger cars was being made up in the "Jersey yards," and a train, consisting of eight or nine cars, had been pulled out on the ladder track some distance east of the crossing (Rec., pp. 6, 14). The most westerly of these coaches was a Pullman car, called the "Lylete," provided with what is known as a Janney coupler, while next to it was a tourist car provided with a Miller coupler. Each of these couplers was provided with a groove for coupling purposes, the intended process being the insertion of one end of a link in the groove of one of these couplers, the other end of the link in the groove of the other coupler, and a pin thereupon inserted in each coupler to prevent the link from drawing out. The Janney and the Miller couplers were, however, not only "not the same sort of couplers," but were of unequal height (Rec., p. 6); the employee of the plaintiffs in error charged with the duty of coupling

them "did not put the link in the slot of the Miller coupler because he could not get it in there;" he "coupled it the best way he could—the easiest way he could couple it;" if coupling two cars the drawheads of which came together plump and even, in coupling them with a link and pin, he would put the link in the slot and not on top of the coupler; but on this occasion, having put one end of the link in the slot of the Janney coupler, he laid the other end of the link on top of the Miller coupler instead of putting it in the slot; then inserted the pin (Rec., p. 7), there being nothing to keep in place the end of the link attached to the Miller coupler except the head or shoulder of the pin. "The link was put in the Janney all secure, and then laid over the top of the Miller, and a pin run through the top of the link and down through the hole in the Miller; there was a place in the Miller coupler for the link to go in, but it was a little lower, and it could not be put in there on account of that curve; they coupled the cars right on a curve." "When the pin was put down through the link and into the hole in the Miller coupler, the head of the pin was on top of the link, and the only thing to keep the link from slipping over the head of the pin was the shoulder around the head of the pin" (Rec., p. 13).

The result was that just as Landrigan was pursuing his accustomed journey to his home for his midnight lunch, and had reached the ladder track, the link slipped over the head of the pin, and the "Lylete" ran down grade, westwardly, over the southwest crossing, running over Landrigan and inflicting injuries from which he shortly afterwards died, running south for more than a hundred yards before it was stopped by striking some stationary cars, loaded with sand and coal, near the property yard. Motley, the employee who coupled the two cars, while engaged in the act informed the yardmaster that he "could [not] couple them up the way they were coupled;" to which the yardmaster replied,

"Couple them up some way and get them out of here" (Rec., p. 10).

At the time of this occurrence, the freight train, with engine attached, was standing across the most northerly of the four tracks, and a north-bound passenger train was due and actually passed immediately after the accident. Willhoit, one of the train crew connected with the disaster, testified that he ran down the north-bound track behind the Lylete; that he saw some one was hurt when he went down, but continued running until he could see what damage was done to the car, and then returned to find that Landrigan was the injured person whom he had seen (Rec., p. 15), and that the runaway car had passed the southwest crossing before No. 78, which was the north-bound passenger train, had reached there, the runaway car having just about gotten across the crossing when the engine of No. 78 began to cross it (Rec., p. 16).

It further appeared from the testimony that when the Lylette began its movement down the ladder track, after becoming uncoupled, the crew endeavored to stop it by using the brakes, but neither the front nor the rear brakes would work. Willhoit testified that he first tried the rear brake and could not get that to work; that he and Wilber then went to the front brake, and Hottal tried to work the rear brake, but did not succeed in stopping the car because it had gotten too much of a start (Rec., p. 13); that he did not know whether he testified at the coroner's inquest that he "did not think the brake was any good, or else it would have stopped the car," or that "the front brake was loose and was not doing any good" (Rec., p. 13.)

Motley also testified that the brake did not hold the car, and that he did not know what was the matter with it (Rec., p. 27.)

There was also testimony tending to show that a Pullman car, running at the speed of the car which is supposed to have struck Landrigan, would make "practically no noise

at all (Rec., p. 30), and that the light upon it was so located as to illuminate the platform only, which was its purpose, and that it would not illuminate the track or cast a reflection more than two feet beyond the bumper of the car. Willhoit testified that it was "dark, night-time, and he could not see (Rec., p. 13), while the nearest street or electric light is 75 yards from where Landrigan was struck and north of the tracks across which the freight train was standing (Rec., p. 10). A witness for years familiar with the locality, frequently passing there at night, testifies that he had never noticed whether this electric light furnished light of any consequence at the intersection of South Capitol street, and that a train standing in the position of the freight train at the time of the accident would have the effect to make it darker at the gates of the southwest crossing (Rec., p. 22).

Mr. Landrigan was found at the side of the ladder track and south of it (Motley, Rec., p. 8), lying on the south side of the outside rail of the ladder track, the most ~~western~~ southerly of the four tracks at that crossing (Willhoit, Rec., p. 12). Blood and fragments of flesh were found on the south side of the ladder track (Kappel, Rec., p. 21). When Willhoit reached him he states that Landrigan was "conscious to a certain stage," and when asked how the accident happened, answered, "I came under the gates and something struck me, and a whole string of cars ran over me" (Rec., p. 15).

The testimony further showed that the western end of the south track was used for storing cars and taking cars in and out for the purposes of the property yard; that these cars would lie there sometimes two or three weeks after being unloaded; that two cars were there, west of the crossing, on the ladder track for several days prior to the accident; that at this point the ladder track is 800 or 1,000 feet from any switch; that there was no shifting or making up or breaking up of trains on the southwest crossing on the south track, this work being done east of that crossing (Rec., pp. 23–24), and that the ladder track west of the southwest

crossing is always rusty (Rec., p. 22). Passenger cars were not stored or handled on the ladder track at that point.

The only witness called by the plaintiff having direct knowledge of the facts and circumstances connected with the accident were two employees of the defendants, employed in the service at the time of the accident and also at the time of giving their testimony, and that they were reluctant witnesses is abundantly shown by their evidence as set forth in the bill of exceptions. Defendants called no witnesses, and the court and jury were accordingly deprived of the light which could have been thrown upon the facts and circumstances of the case by the witnesses whom it was within their power to produce. Neither the yardmaster, nor any watchman or gateman, nor any other employee or representative of the defendants was called to deny or question the testimony that the gates were habitually down from about ten o'clock at night until six o'clock in the morning. The watchmen or gatemen on duty at the time of the accident were not produced to show whether the gates were in fact lowered at or shortly before the time of the accident, as a warning to passers-by, or whether they had not been down for several hours prior thereto, regardless of the fact whether trains were passing or not, in accordance with what the testimony for the plaintiff showed was the general usage or custom. It was not even shown that any watchman or gateman was on duty that night, or present either at the time of the accident or afterwards. Neither the yardmaster, Hottal, who was directing the making up of the train from which the Lylete was detached by its defective coupling, nor any other of its employees, was called upon to account for or explain the manner in which the cars were coupled, nor the manner in which the accident happened, nor why the brakes did not work, nor to show why suitable signal lights or other warnings were not displayed at the rear of the train. The defendants simply contented themselves with a motion to direct a verdict in their favor, on the ground

that the attempt of Landrigan to cross the tracks in order to reach his home for his accustomed midnight lunch, notwithstanding the fact that the gates were down. was conclusive proof of contributory negligence on his part, precluding recovery, and this notwithstanding the further fact that, under the evidence in the case, he had necessarily to pass under those gates, for the same purpose and under the same circumstances, in order to reach his home at all, every night during the nine years that he had been employed by the defendants at their round-house, and that during all this time the gates were habitually down, whether trains were passing or not.

The defendants' first, second, third, and eleventh instructions were simply elaborations of their request to direct a verdict in their favor. Their fourth and fifth instructions, to the effect that there is no presumption that the decedent complied with his duty to look and listen for approaching trains, is in conflict with the decision of this court in Continental Imp. Co. *v.* Stead, 95 U. S., 161, 194, while the sixth instruction was simply to the effect that there was no evidence to show the existence of any usage or custom to keep the crossing gates down after 10.30 p. m. in the evening until an early hour the next morning, in direct conflict with the evidence adduced, as shown by the bill of exceptions. The only questions in the case, therefore, are, first, Was there evidence of negligence on the part of the defendants, causing the death of Mr. Landrigan? and, secondly, was there evidence of contributory negligence on his part so conclusive as to require the court to take the case from the jury?

ARGUMENT.

The issue was raised by motion to instruct the jury to return a verdict for the defendants, and by sundry prayers, which were the equivalent of such a motion.

The controversy here is one principally of fact.

The sufficiency of the evidence is not the issue. That question is peculiarly one for the jury.

The trial judge was asked to instruct the jury to find for the defendants. Before this could have been properly done, it must have been made to appear either that there was no evidence of the defendants' negligence, or such clear and convincing evidence of contributory negligence of the deceased that no reasonable men could fairly differ about it. In the case of Douglas *v.* The Chicago, Milwaukee & St. Paul Railroad Co., 100 Wis., 407 (a case relied upon and quoted by appellants), the tests of the respective functions of judge and jury are thus stated in the opinion of the court:

"Where there is a reasonable dispute as to the evidentiary facts tending to establish negligence, or to the reasonable inferences, which a jury might draw therefrom, the ultimate fact as to whether the party charged with negligence is guilty, is for the jury; but where the facts are undisputed, and the inferences therefrom *all one way*, the controversy turns upon the question of law that must be decided by the court."

This court has clearly and strongly stated the rule in the following language:

"When a given state of facts is such that reasonable men may clearly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court." Grand Trunk Railroad Co. *v.* Ives, 144 U. S., 408.

The same tribunal in a later case quotes and endorses the above paragraph from the Ives case. Texas & Pacific R'w'y Co. *v.* Gentry, 163 U. S., 353–369.

The Court of Appeals of the District of Columbia, in the case of Cowen *v.* Merriman, 17 App. D. C., 186, sets out in the body of its opinion the test announced in the Ives case, and quoted approvingly in the Gentry case, and, applying that test to the facts in the Merriman case, says:

"In this case it may be well contended that the proof of contributory negligence on the part of the deceased is strong, and many reasonable minds might be decidedly inclined to conclude from it that the deceased was guilty of contributory negligence in causing the accident. But the state of proof is such, that we cannot say that *all reasonable men* would so conclude."

There is no discordant note in the cases in this jurisdiction on this subject, and further reference to them surely ought to be unnecessary. Applying the test (about which there ought to be no sort of question) to the facts of this case, it can be readily ascertained whether or not there was error on the part of the trial judge in refusing the motion to instruct.

I.

Defendants' Negligence.

In examining into and passing upon the testimony of the witnesses Motley and Willhoit, it is to be noted that both of them were, at the time they were examined, in the employ of defendants, and that they were unwilling witnesses against their employers:

The defendants are charged with three several acts of negligence, which, according to the contention of plaintiff, separately or in conjunction, caused the death of Thomas J. Landrigan. They are: (1) Defective coupling or a careless

and negligent coupling of the runaway car with the coach immediately in front of it; (2) defective and worthless brakes on both ends of the runaway car; (3) absence of a light and other danger signals. The testimony upon which the trial court passed in refusing defendants' motion is not only pertinent, but necessary in order to enable this court to determine if there was error below. We give a carefully prepared summary of the evidence on these points in the order stated above.

A—The Coupling.

Motley: Coupled the coach with the assistance of brakeman Willhoit and Hottal, the yardmaster. The car that broke away was a Pullman, and the car to which it had been coupled was a tourist car. The Pullman had a Janney coupler, and there was a Miller coupler on the tourist car. The Miller and Janney couplers would not couple. They were not made or intended to couple together. One was a little higher than the other, the Janney being the higher of the two, but don't remember whether or not one went over the other. One of the draw-heads was higher than the other. It was a very difficult coupling to make, and a link and pin had to be used to couple the cars together. * * * He did not know whether the difference in height made them less or more difficult to couple. He coupled the two cars in question by putting a link in the Janney coupler and putting a pin through the hole in that coupler; *then laid the link on top of the Miller coupler*, and put a pin down through it. In both the Janney and Miller couplers there is a slot for a link and also a hole for the pin to go in. He did not put the link in the slot of the Miller because he could not get it in there. He could not explain why he did not do it that way. It was a difficult coupling to make either way. He did not remember whether they tried to do it that way or not—he coupled it the best way he could; the easiest way

he could couple it—or whether the difference in the height of the two couplers had anything to do with causing him to put the link on top of the Miller coupler instead of placing it in the slot of the Miller * * * The pin held the link in position on top of the Miller coupler; the link could not very well go over the top of the pin which held it in place—leading over the switch, the two couplers rubbing together forced the pin up out the hole, so as to pry it up.

* * * The link was too short to put it in the slot of the Miller coupler, but the link was long enough to enable the pin to go down through the hole. Where the link is laid on top of the coupler instead of in the slot, he does not know what would be the effect upon the rear coach if a slack should take place by the cars coming together. The coupling which he made was a very ordinary coupling, and is made right along; possibly it might hold all right; he had never seen it break loose before; it was customary to couple cars by putting the link on top instead of through the slot; this coupling was caused to break away by the slack running up between the cars when they jolted together—by the Janney and Miller couplers running up together; the rubbing together made the pin raise up and broke it loose—when coaches are properly coupled together they break loose very often in that way; when two cars are properly coupled with a link and a slack is produced, causing them to bump together, they come apart sometimes, although this is very rare, and it is also very rare that the other coupling comes apart. * * * He does not remember what became of the link or pin after the car broke away (Rec., pp. 6, 7). * * * The link and pin used in making the coupling were the ordinary link and pin (Rec., p. 8). Ladder track is an ordinary down grade from the point where the car broke away toward South Capitol street (Rec., p. 6).

CROSS-EXAMINATION: * * * That if they had not made a link-and-pin coupling they might have pulled the cars out with a big heavy chain; a chain is used sometimes

when the draw-head is pulled all the way out; where there are two draw-heads, with a coupler in each draw-head, the ordinary way to couple them is to use a link and pin whenever the couplers are not alike (Rec., p. 10); followed runaway car down to crossing after he got rid of rest of cars; reached there about three minutes after the car passed over the crossing (Rec., p. 9).

REDIRECT EXAMINATION: Hottal, the yardmaster, was present when witness coupled the cars together; witness told him that he could [not]? couple them up the way they were coupled, and Hottal said, "Couple them up some way, and get them out of here." At that time the crew was waiting for the car on the main track, and they were in a hurry to get it out; he was having some difficulty to get it coupled when he made this remark to Hottal. It is not true that the cars would not couple at all; they would not couple without using a link and pin. The coupling was safe enough to pull the car out of the yard, and that was all that was wanted; it did not do it on that night because it broke loose; nothing extraordinary happened to make it break loose. * * * The couplings "slipped around," he supposed, when they were going around the curve, and that had a tendency to make them come apart; he supposed it was due to the slack caused by coming over the switch on the ladder track; the statement made by him at the former trial, that he "used a link, put a pin down through the Miller, just a temporary coupling to pull the car up this track, and put the link over the Miller, put the pin down in the Miller, and stuck a pin through the link, and the pin having a head on it held in that position—held the link in position to pull the car out—but when it got up on the curve the slack ran together, and probably the pin dropped down—the link jumped over or twisted off the head of the pin—that is as nearly as I can explain it to you about this coupling," was substantially correct. That after the car was coupled they pulled it probably 45 or 50 yards, and when

it got on the curve formed by the ladder track and the track from which they were bringing it, it broke away; that he knew this curve was there (Rec., pp. 10, 11). * * * They could have used a chain on that night, but did not have any to use when they wanted to get the car out; there were chains in the yard; he does not know whether the chain would have been perfectly safe or not; the car might have broken away by the chain becoming united or loose or breaking, unless it was very strong; that he did not remember examining the pin on the tourist car, but remembered looking at the pin in the Lylete, the Pullman car. This pin was still in the hole in the link, and this satisfied him that the link had pulled over the head of the other pin (Rec., p. 11).

RECROSS-EXAMINATION: The head of the pin would not go through the hole in the link and would hold it in position; that the draw-head was a big piece of iron fastened to the end of the car, and the coupler was attached to the end of the draw-head. When the draw-head is completely pulled out the coupler comes with it. When two cars are in that condition they have to use a chain to keep them together. When the cars have a complete draw-head and coupling attached, no chain is necessary, and they simply used a link-and-pin coupling when the couplers are not alike. This was the way they did on that night. There was nothing the matter with the draw-heads. They were simply different couplers and would not couple (Rec., p. 11).

Willhoit: Hottal (the yardmaster), Motley, and himself made the coupling. One car had a Miller and the one that broke away had a Janney coupler. It is impossible to couple a Miller and Janney together. It was on a curve, and therefore they used a link and pin. It was a secure coupling to pull the car around in the yard, but it was not a safe coupling to run over the road. It was sufficient for the yard and was very frequently done.

The couplings did not couple exactly, because they did not fit. You cannot couple two such couplings together, and have to use a link and pin. The Miller coupler is not as high as the Janney; it is a thinner piece of iron, and the draw-head is thinner than that of the Janney. The link was put in the Janney all secure, and then laid over the top of the Miller and a pin run through the top of the link and down through the hole in the Miller. There was a place in the Miller coupler for the link to go in, but it was a little lower, and it could not be put in there on account of that curve. They coupled the cars right on a curve. The curve swayed the car around and brought the Miller coupler out on the side like. *When the pin was put down through the link and into the hole in the Miller coupler, the head of the pin was on top of the link, and the only thing to keep the link from slipping over the head of the pin was the shoulder around the head of the pin;* that he supposes it would have been safer if they could have put the link through the regular place for that purpose in the Miller coupler (Rec., pp. 12, 13).

CROSS-EXAMINATION: He saw the coupling made, but did not make it himself. When they found cars with the old-fashioned draw-head, and wanted to couple them to a car with a Janney coupler, they used a link and pin, which was the usual coupling when they got cars of that kind; this was done very frequently, but it is not done so much now as formerly because they get more cars with the new equipment; that he did not say the Miller coupler was lower than the Janney, but that it was not as thick as the Janney, which made it apparently lower than the Janney when the cars came together; that they laid the link on top of the Miller because they could not get it into the groove; the top of the pin was holding it in place (Rec., pp. 14, 15).

B—The Brakes.

Motley: The men on the car, Hottal and Willhoit, did all they could to stop it; he saw these men putting the brake on at the end of the Pullman car next to him, but could not see what they did at the other end; he did not know whether they left the end next to him for the purpose of putting the brakes on the other end; the car ran a little over a hundred yards, probably, before it stopped; it was stopped by striking some cars down on the ladder track (Rec., pp. 7, 8). * * * He did not remember testifying at the former trial that they could not stop the car because of a "defect in the brake—the brake did not hold," but that it is true that the brake might have hung in some way; *the brake did not hold the car*, but he does not know what was the matter with it (Rec., p. 11).

Willhoit: When they were pulling the car out on the straight track he tried the brake and it appeared to be all right, but when some one hollered that this car had broken off he went to work on it again; *it did not seem to catch hold;* he dropped off the end of the car and caught the rear end of it—the head end—and at the same time Hottal got on the end that he got off of, called for Wilber to help him to put the brake on, and they did all they could to stop the car, but the car had got too much start. The brake seemed to work all right; he did not have any fault to find with the brake, only the car had got too much start. He first tried the rear brake and could not get that to work; then went to the other one. While he and Wilber were working on the forward brake Hottal jumped on and tried to work the rear brake; *they did not succeed in stopping the car* because it had gotten too much of a start (Rec., p. 13). * * * The car was running slowly when he started to put on the brake; he jumped off, went to the other end, and when he got there the

car was not running very fast. Hottal got on the rear end just as he got off; does not know whether or not he said at the coroner's inquest that "he did not think the brake was any good or else it would have stopped the car," nor could he say whether he testified at the inquest that the front brake was loose and was not doing any good. *The brake did not do any good* because the car had too much start. Wilber jumped off with him. You sometimes apply a brake and it does not "take up" right at first; could not say whether he noticed any slacking up of the car as a result of putting on the brakes, because he got off, and it was dark, night-time, and he could not see (Rec., p. 13). Followed the car down, practically kept with it, but was a little distance behind it (Rec., p. 14).

C—Lights and Signals.

Motley: "A white light in the vestibule of the Pullman in the little dome-shaped arrangement in the roof of the car—this was the only light hanging in the vestibule, and there was no light on the platform" (Rec., p. 8).

Cross-examination: "The lamp in the dome had a white shade or globe underneath—it gave a bright light—you could see it all right—the lamp was inside the door and the door was closed—the glass in the door extended about half way down, and the light shone through the glass in the door—the same sort of light was in both ends of the car" (Rec., p. 10).

Willhoit: "There was a light on both ends of the coach—there was a light in the coach, but none on the back platform" (Rec., p. 14).

Cross-examination: "Did not stop because, *by the light being in the car*, he thought perhaps there was a porter or somebody in there" (Rec., p. 15).

In other places in the testimony of this witness he testifies that the light was bright and could be seen on the ground, etc., but detailed reference to, and quotations from, it are given in another portion of this argument.

44 One thing is manifest: That both Motley and Willhoit place the light, in one portion of their testimony, in the roof of the car, protected by a shade or globe, and in another portion wholly within the car; but there is no pretense that there was a red or other signal light on the end or platform of the coach.

It is not claimed that any signals or warnings of any kind of the approach of the car were given.

II.

Alleged Contributory Negligence of Deceased.

Defendants charge that this contributory negligence which they would impute to deceased consists of two distinct acts on his part: (1) going under the closed gates; (2) failing to look and listen. Let them be disposed of in their order.

(1.) *Going under the closed gates.*

Appellants cite many authorities and quote *in extenso* from the opinions of the courts in support of the general proposition that to go under closed gates and on a railroad track constitutes negligence *per se*.

We have no quarrel to make, either with the decisions quoted and relied on or with counsel for citing them.

The principle as stated, and when applied to the ordinary case, where the gates are used as signals of danger or safety—danger when closed, and safety when opened—is obviously wholesome and sound.

If, therefore, the condition of the gates and their method of operation at the crossing where Landrigan was killed had

been normal; if at the time of his death and immediately preceding ~~and succeeding~~ the 29th of August, 1898, the gates at this crossing were lowered when danger was present and imminent, and were raised when danger was absent and not immediate, this action would never have been instituted. In fact the Court of Appeals in Railroad Co. *vs.* Carrington, 3 App. D. C., 101, 111, has passed upon this identical point, saying:

"The fact that there was a gate, and that it was the constant practice to lower it when trains were passing or about to pass, and that it was not lowered on this occasion, was one proper to be considered by the jury in determining the question of the contributory negligence of the plaintiff's intestate."

Upon the testimony of the witnesses, eight in number, it was shown for the plaintiff, and it is an uncontradicted fact in the record, that, at this crossing of South Capitol street, it was the rule and custom of the defendants to lower the gates at ten or eleven o'clock at night, and to keep them down throughout the hours of the night until the early morning, raising and opening them only when vehicles were there and parties in charge of them asked that they be opened to enable them to cross.

While the testimony of the witnesses is not entirely in accord on the point as to whether the gates were *ever* up when no trains were in sight or approaching (five out of the eight testified that they had never seen them up between the hours named on a single occasion except when the gateman was asked to raise them), they are as one on the proposition that it was the *rule*, the *custom*, to keep them down from ten or eleven o'clock at night until morning.

The Court of Appeals in the present case said:

"The gate had not been uniformly lowered and raised for the purpose of warning, on the one hand, or of assurance on the other. The evidence tended to show that the gates were often lowered from ten to eleven o'clock at night and kept

lowered until daylight the next morning, without regard to the passing of trains. Passengers desiring to cross in vehicles were frequently compelled to call up a gateman to raise the gate. Persons on foot would do the same thing or else pass under the gate and then across the tracks. This state of things had existed for some years, during which the deceased was almost nightly engaged in crossing the track at that point in going to and fro between the machine shop and his home" (Rec., pp. 61–62).

Defendants offered no evidence in opposition to or in contradiction of the testimony offered by the plaintiff on this point, or upon any other. Their failure to do so, where the witnesses who operated the gates, and who knew and could have testified better than any one else as to the exact facts, were their own employees, whom they could readily have produced if those facts would have been to their advantage, of itself creates a case for the deduction of inferences that the facts were adverse to them, upon which the plaintiff was entitled to have the jury pass (Am. Bell Tel. Co. *vs.* Nat'l Tel. Mfg. Co., 109 Fed. R., 976, 1018; *In re* Kellogg, 7 Am. Bank. Reg., 635; Graves *vs.* U. S., 150 U. S., 118, 120–'1; Runkle *vs.* Burnham, 153 U. S., 216, 225).

If this case were being argued *now* before a jury, we submit, respectfully, that there is in the record sufficient testimony to establish the following propositions:

(1.) That the gates were kept down all the time between the hours of the night heretofore stated, and, without variation, were not raised, except when a vehicle was to pass and a request to raise the gates made. This proposition by a clear preponderance of the evidence.

(2.) That there was a custom, usage, or rule, definite and fixed, to keep the gates down between the hours named, whether trains were in, or out of, sight, with an exception now and then when the gates were up and no trains were

passing or in sight. This proposition beyond a reasonable doubt.

(3.) That Landrigan, the deceased, had full knowledge of this custom or usage, and had many times before his death acted upon the faith of it. This proposition beyond a reasonable doubt.

But this court is not reviewing the action of the jury in deciding this issue with plaintiff. It is not to pass upon the question on which side is found the preponderance of the evidence. The question whether the jury properly exercised its peculiar function to weigh the evidence is likewise not, now and here, the subject of review.

The alleged error lies in the refusal of the trial judge to direct the jury to return a verdict for the defendants—in other words, whether "*the state of proof* [*in favor of the defendants*] *is such that * * * all reasonable men would so conclude.*"

So great is the weight of the evidence in plaintiff's favor that it *cannot be said* for defendants' contention here, as was said by the Court of Appeals in the Merriman case, "that the proof of contributory negligence on the part of the deceased is strong, and many reasonable minds might be decidedly inclined to conclude from it that the deceased was guilty of contributory negligence in causing the accident."

In the case on trial, the Court of Appeals said (pp. 61 and 62 of Rec.):

"Under this evidence, we do not agree with the contention that all reasonable minds must necessarily come to the one conclusion that deceased was guilty of contributory negligence in passing under the gate and attempting to cross the tracks, without any other act of negligence. Finding the gates closed under these circumstances, the deceased was not bound in law to take it as a warning of immediate danger, and to stop and wait and call for information to an unseen

gateman. in fact there was a gateman within sight or hearing at the time, there is nothing in the evidence from which it could be inferred."

To summarize—plaintiff's contentions are:

a. That the gates at the crossing, prior, at, and subsequent to Landrigan's death, were uniformly, or at least customarily, lowered at or about ten o'clock at night, and were kept down throughout the night, until the early morning, and were raised only when necessary to allow the passage of vehicles.

b. That deceased knew of this usage or custom, and had many times acted on the faith of it.

c. That the legal effect of this rule of the operation of these gates takes the case of Landrigan out of the general rule that it would be negligent *per se* to go under the closed gates.

The evidence upon which plaintiff relies to establish each of these propositions of fact has been collected from the record and is here succinctly set out under its appropriate head.

A—Condition of the Gates.

Webster: The gates at the southwest crossing of South Capitol street in the month of August, 1898, and prior thereto, whether trains were passing or not, were generally kept down—that was, as a rule. Of course, he could not say they were down all the time, but as a rule they were down after ordinary bedtime; for a number of years had occasion to cross the tracks back and forth both day and night, because business required him to go down there. He had gone along there at 11 or 12 o'clock at night and at all hours of the night, and it was his experience that these gates were *always* down after ordinary bedtime; that he was running a brick yard and this caused him to go down there very often at

night and to come home at all hours of the night, and he would *always* find the gates down continually; it did not make any difference whether the trains were passing or not, * * * crossed right over without hesitating because he found that was the regular condition of the gates whether a train was passing or not; did not see any effort made to raise them; has seen them down at all hours of the night after half past ten or eleven o'clock up to three or four o'clock in the morning. The gates were down and kept down, he supposed, until daylight; that when coming north at night, as a rule, he would have to get under the gates (Rec., pp. 16 and 17).

CROSS-EXAMINATION: After April, 1893, up to the spring of 1898, he had been in the habit of crossing the tracks at this crossing in the night-time on an average of about twice a week; some weeks he might have gone oftener than that; would return across the tracks as late as twelve to half past one o'clock. Since the spring of 1898 he has not paid a great deal of attention to these crossings, because he did not have much occasion to cross there. He has crossed there since that time at night, but not very often. Before Landrigan was killed he had occasion to cross there quite often; that he had not crossed there late at night since that time without seeing the gates down, but could not specify any particular time when this occurred. Could not recollect ever attempting to cross the tracks going *south* and finding gates down when he did not see a train or shifting engine in sight. Going north he has found the gates down and a train, shifting engine, or car moving in the vicinity of that crossing, and sometimes he has crossed there and found the gates down when he did not see any train, car, or engine in the vicinity; * * * that he has frequently crossed there at night and found the gates down when trains were actually about to pass, and he would see the gates down without any trains there oftener than he would see them there. When the gates were down trains might have been

approaching that crossing and he not have seen them, although they must have been a good way off if he did not see them (Rec., pp. 17 and 18). Redirect: That during the month of August, 1898, and subsequently thereto, he crossed there at night about twice a week, and the condition of the gates after the usual bedtime was about the same. He did not discover any difference in them as compared with what it was before Landrigan was killed (Rec., p. 19). Recross: That he had passed there prior to the accident when he had approached this crossing during the night (witness does not specify the hour) and found gates up and no trains in sight (R., p. 20).

Story: Was familiar with southwest crossing of South Capitol street and Virginia avenue, and had been traveling there about 15 or 20 years, both in the daytime and night-time; sometimes would pass there three or four times a day; sometimes maybe only once a week; then again would be six or seven times of a night, and then might lay off a week; that this practice had continued for 15 or 20 years; during this period had passed there at night, and had called the watchman several times to get the gates up; the gates were mostly down all the time when the trains were passing; when going home, somewhere between 12 and 4 o'clock, sometimes gates would be down, and he would have to call the watchman to get past; this was so when no trains were passing (Rec., p. 20).

CROSS-EXAMINATION: When he spoke of gates being down, he spoke from his personal knowledge; in crossing in the daytime, he found that they put the gates down when trains came along, and when trains were not coming they would put the gates up; in the night-time the most trouble he had with the gates in getting past was after 12 o'clock; sometimes they would put the gates down and maybe go to sleep, or something like that, and he would have to holler to get the gates up in order to pass by; he would not like to say

positively how often *this* happened, but could clearly say it was about a dozen times; may have been more, but could clearly say it was that often; have frequently come to these gates at night, both before and after 12 o'clock, when no trains were approaching and found the gates up and crossed without any trouble, and he had done this very much more frequently than he had been stopped by the gates being down; could not say exactly whether the gates were more frequently up than down at night when no trains were passing; had noticed it about a dozen or fifteen times in passing by when he would come from a ball, or something like that; had noticed gates down and no trains passing and had to holler for the gateman; this was generally after 12 and up to 3 or 4 o'clock at night (Rec., pp. 20, 21).

Kappel: In August, 1898, was working in daytime; had worked on the night force, but not during the year 1898; had occasion to cross the southwest crossing at night, immediately prior to and about the time of Landrigan's death. The gates as a general thing in the night-time were down. During the summer of 1898, and for five or six years previously, he had passed over this crossing three or four times a week at all hours of the night up to one o'clock, and that after 11 o'clock he generally found the gates down, whether trains were passing or approaching or not; after 11 o'clock the gates were generally kept down whether there was a train in sight or not; he and Landrigan used to go home together for 2 or 3 months; that they both worked at night at the time; that the gates were down and they had to crawl underneath the gates to get home; that the gates were generally kept down and they very seldom ever saw the gates up; that the times when Landrigan and the witness crossed were between 12 and 1 o'clock at night and between 6 and 7 o'clock in the morning (Rec., pp. 22, 23). * * *

CROSS-EXAMINATION: That when he crossed the tracks with Landrigan at night they were coming home to lunch between 12 and 1 o'clock (Rec., p. 23); that during the year prior to Landrigan's death he crossed at this point at night after 11 o'clock on an average of about once a week or a little oftener; that he usually found the gates down whether trains were in sight or not; that he has come there after 12 o'clock at night, when no trains were in sight, and found the gates up, but very seldom; that he has found them up *only* when somebody halloaed to the man to raise them up; that after the traffic of the day was over they would put the gates down and keep them down unless somebody asked to have them raised. * * * He always found the gateman there when he was passing at night; * * * that he has crossed over at night and found the gates up when no trains were coming, *but people were passing and halloaing to the watchman to raise the gates; that the gates* were never hoisted all the way; they were on a slant (Rec., pp. 24, 25).

Martin: Was born and raised in that vicinity; lived on South Capitol street, about half a mile below southwest crossing. He always found the gates down at the southwest crossing in the summer of 1898, after 10 or 11 o'clock at night, whether trains were coming or not; *that he did not remember a single instance when he found the gates up after 10 or 11 o'clock at night;* that he had been driving up and down there once or twice a week since about 1886 (Rec., p. 25).

CROSS-EXAMINATION: The gates were *always* down, and during the fifteen years that he had crossed there he has had to wake up the watchman two or three times probably. On the other occasions when he would come there he would call to the watchman, and he would raise the gates if there was no train coming. He thought it was the custom for him to leave the gates down. He thought it was a safeguard. He did not know any better then, and deemed it a

proper thing because of the small amount of use of that crossing at that time of night—*i. e.*, to have the gates raised when anybody wanted to go through if no train was approaching. If there was any doubt as to whether any train was approaching, the watchman would always call to the watchman on the other side and ask him if a train was coming; that he regarded these precautions of keeping the gates down at that time of night and of calling to the watchman on the other side to know whether a train was coming or the track was clear as a safeguard and a proper thing to do (Rec., p. 26). * * *

REDIRECT EXAMINATION: That he only found the watchman asleep two or three times, and the only difficulty he had in getting him to raise the gates occurred when the watchman was in his box late at night, *but always found the gates down* (Rec., p, 26).

Wilkinson: In the summer of 1898 resided on South Capitol street south of the southwest crossing; had been living there about 11 years; that he had crossed at this crossing for 12 or 15 years at night-time, after the usual bedtime. The gates were usually kept down whether trains were coming or not; that he often had to ask the man to hoist the gates, and sometimes would have to wake him up; that he crossed there at night once or twice or three times a week; that he *would not like to say any instance when he found the gates up at night* * * * (Rec., p. 27).

CROSS-EXAMINATION: That he would approach the gates from the south at night-time after 6 or 7 o'clock, and usually found the gates down; sometimes there would be 2 or 3 teams waiting there—sometimes might find trains passing or that they had just passed. * * * That generally he would not stay there, but would go through and take whatever risk attached to it; that he always got through before the engine would even get in sight; had gone under the gates and over the crossing when cars or engines were ap-

proaching; that when he returned in the neighborhood of 10 or 12 o'clock at night he would generally *find the gates down; that he could not say that he has ever come down there and found the gates up when no trains, cars, or engines were moving in that vicinity;* that when he found the gates down he would just go under the gate and go on through without calling to the watchman to raise the gate (Rec., p. 27).

Oeser: In 1897 and 1898 lived on South Capitol street, south of the railroad tracks, and had occasion to pass the southwest crossing sometimes 2 or 3 times at night; that he generally crossed this crossing 15 or 16 times each week, night and day, in going to his business at the K Street market; that he has crossed there at all hours of the night from 9 until 1 o'clock at night; *that during* 1897 *and* 1898 *the gates after bedtime were kept down all the time; that he never saw the gates up after bedtime except when some one would ask to have them raised* (Rec., p. 28).

CROSS-EXAMINATION: That on 4 different occasions during the 11 years that he lived down there he had to wake up the watchman in order to get him to raise the gates (Rec., p. 28).

REDIRECT EXAMINATION: That during the years 1897–'98 and '99 he crossed there at all hours from 6 or 7 to 12 o'clock at night and 3 o'clock in the morning; that sometimes he would find a train there and sometimes he would not, *but would always find the gates down* (Rec., p. 28).

Tripp: In the summer of 1898, including the month of August, the gates at this crossing, after the usual bedtime, were mostly kept down; that he has seen them down at 9 o'clock, and presumes that they were kept down all night. *Every time he saw them they were down, whether trains were passing or not* (Rec., pp. 29 and 30).

CROSS-EXAMINATION: That when people approached the crossing at night and wanted to cross, if they were walking, they would generally stoop under the gates and walk across.

If driving, they would have to holler to the watchman to raise the gates; that he has seen this along in the summer of 1898; that they would be up at times, but always down when trains were passing (Rec., p. 30).

B—Landrigan's Knowledge of the Condition and Operation of the Gates and His Acts and Conduct in Accordance Therewith.

See testimony of plaintiff (Rec., p. 31) and of witness Kappel (Rec., pp. 21, 22, 23).

C—Legal Effect of Such a Custom on the Conduct of Deceased in Going under the Closed Gates.

Assuming for the purpose of the argument that the plaintiff succeeded either in establishing such a custom with reference to the gates, or that the testimony on that point was sufficient under the rule to go to the jury, it is respectfully submitted that going under the gates, considering the facts of this case, was not negligence *per se*.

The principle underlying the general rule that such conduct would of itself be negligent is obviously based on the assumption that the gates are *live* gates; that they are operated in accordance with the purpose for which they are ordinarily put at railroad crossings, viz., to be lowered and closed as an indication of present danger—as a note of warning that a train or locomotive is passing or approaching, and to be raised and opened when no danger is imminent.

For one to undertake to cross the track or tracks in the face or in defiance of a distinct announcement that a train is in sight and about to go over the crossing would be negligent, reckless, and foolhardy, and a case arising out of such a state of facts would not be submitted to a jury to discuss and decide—the question would be answered by the law.

It would be wholly immaterial whether the note of warning to the pedestrian was given by a watchman, standing at the crossing, who, seeing the approaching train, should, in *words*, inform the traveler of the presence of the specific danger, or, by the waving of a red flag, should announce the train's approach, or by lowering safety gates should thereby give out the same information.

The negligence consists in going when he is told not to go!

But how different would be the situation and our characterization of the conduct of the pedestrian if the watchman should continuously, by day and by night, cry "wolf!" whether the "fold" was in danger or not, or should wave his flag of peril without regard to the presence or absence of trains and locomotives, or should lower his gates and keep them lowered throughout the hours of the day and night—lowered when trains were passing or approaching and still down when no danger anywhere existed! When a danger signal thus becomes no real signal of danger, no negligence is to be imputed to the traveler who knows the fact and acts upon it.

Cessante ratione legis cessat et ipsa lex. A fortiori, when a signal ceases to be used for the object it was intended, it ceases to indicate that object.

The Court of Appeals, passing upon the effect of a custom, in the case of Dashiell *v.* Market Company, 10 App. D. C., 81, 89, said:

"If there had been any proof of usage or custom on the part of the market men to use this elevator themselves, with the sanction, express or implied of the defendant company, the case would have been very different; but there was no such proof."

Appellants chiefly rely on two cases to support their contention that the customary condition of the gates is an immaterial matter, viz., Douglas *v.* R. R. Co., 100 Wis., 405, and Sheehan *v.* R. R. Co., 166 Pa. St., 354.

An examination of these cases will readily show that they have no real application here.

The Douglas case simply and only decides that "*what persons customarily do under similar circumstances has no application as a test of ordinary care, where the act is so obviously dangerous as to constitute negligence as a matter of law.*"

We quote from the statement of facts:

"The evidence tended to prove that at a Becker Street crossing of the defendant's railway right of way in the city of Milwaukee, it maintained its railway tracks with a gate on each side of the right of way, so operated that when the crossing was about to be used for the passage of trains, *the gates were let down so as to bar the approach to the track for the entire width of the street;* that plaintiff was familiar with the crossing and the purpose for which the gates were used; that pedestrians were accustomed, notwithstanding the operation of the gates, to enter upon the right of way as in their judgment circumstances would permit; that on a dark night between the hours of nine and ten, plaintiff approached the crossing by way of the street from the east; *that as he arrived at the gate it was let down, but he, notwithstanding, passed around it and proceeded to cross the right of way.*"

Referring to "live" gates, as these unquestionably were, the comment of the court in the opinion is peculiarly apt:

"Where gates are *so maintained,* it is the duty of travellers on approaching the right of way and observing that the gates are down or about to be let down, to stop until they are raised before proceeding. The presence of a gate across the approach to a railway track says to the traveller, in a manner not to be misunderstood, that such tracks are presently to be used for the passage of trains."

To apply such language to gates that were "dead," so to speak—that indicate nothing one way or the other as to danger or safety—would not only be inapt, but unreasonable. Can it be claimed that the presence of the gate across the southwest crossing of South Capitol street, under the

facts of this case, was tantamount to a declaration by the defendants—

"to the traveller, in a manner not to be misunderstood, that such tracks are presently to be used for the passage of trains"?

The Sheehan case is of but little value and has but little application to the facts of this case.

Three important facts should be noted in connection therewith:

(1.) It nowhere appears in the statement of facts or in the opinion of the court that the party injured had any knowledge of the custom to keep the gates lowered, or that he acted upon such custom or usage.

(2.) The plaintiff went under the gates and crossed the railroad, with the track in full view, and there was no obstruction whatever at the point of the accident, and the case largely turned upon the fact that the plaintiff could not be said to have looked and listened, and that the crossing of the railroad track, apart from the gates, under the circumstances of the case, was contributory negligence on his part.

(3.) The tracks in question were live tracks, not only used habitually for the passage of trains, but over which a train, in full view, was then in the act of passing—not a dead track.

(4.) There is but one line of comment in the opinion of the court upon the effect of the gates being customarily down, and it is evident from the perusal of the opinion that no sort of consideration is given to that fact. It may have been because it was unnecessary to consider the effect of such a custom, inasmuch as the crossing of the track itself without looking and listening was held to be negligence *per se*, wholly independently of the condition of the gates.

DUTY TO LOOK AND LISTEN BEFORE ATTEMPTING TO CROSS RAILROAD TRACKS.

A—Presumed to Have Looked and Listened.

The duty of one before attempting to cross a railroad track to look and listen for the approach of trains is so well settled and is so reasonable that no attempt on the part of the appellee is made to combat it; but it is equally well settled in this jurisdiction, both by the Supreme Court and the Court of Appeals, that, in the absence of any evidence to the contrary, *it is to be presumed in favor of the deceased that he did so look and listen.* The Supreme Court of the United States, in Continental Improvement Co. *v.* Stead, 95 U. S., 161, 194, stated the rule as follows:

"Those who are crossing a railroad track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. They have, indeed, the greatest incentive to caution, for their lives are in imminent danger if collision happen; and *hence it will not be presumed without evidence that they do not exercise proper care.*"

And the Court of Appeals in Cowen *v.* Merriman, *supra*, following the rule adopted by the Supreme Court, said:

"Whether he (deceased) did or did not look and listen for the approach of the trains, before stepping upon the tracks, nowhere appears from the evidence, except as it may be inferred; and in the absence of negative evidence, or evidence that he did not look and listen for the approach of trains the presumption would be that he did." Following Tex. P. Rwy. Co. *v.* Gentry, 163 U. S., 353, 366, and Continental Improvement Co. *v.* Stead, 95 U. S., 161, 164.

B—Does the Evidence Rebut This Presumption that He Looked and Listened?

This is the sole question remaining. In order to justify the trial judge in instructing for the defendant, the evidence rebutting the presumption that deceased looked and listened must be so strong and conclusive "that all reasonable men would so conclude."

In order to pass safely upon this question, it is not only proper, but necessary, that all the facts and circumstances surrounding the occurrence should be taken into account, among them the following:

A—The Condition of the "Ladder" Track at the Place Where Landrigan was Injured, the Use for Which That Portion of the Track was Employed, and His Knowledge of These Facts.

The following extracts from the testimony on that point justifies the court in submitting the condition and use of that portion of the ladder track to the jury:

Motley: The end of this "ladder" track, in the neighborhood of South Capitol street, was used for shifting purposes and for putting cars or anything there they wanted to store there; has never seen passenger coaches stored down there, because it is not long enough for that; the only cars he ever saw stored there were freight cars (Rec., p. 8).

It was not customary to handle passenger cars on that side, at the southwest crossing of South Capitol street. Witness and his men were freightmen ordinarily, but are called upon now and then to handle passenger cars (Rec., p. 9).

Webster: South Capitol street is divided by the reservation in the center of it, which is about 50 or 60 feet wide, thus making two crossings (Rec., p. 16). The most south-

erly of the four tracks at the crossing (southwest) goes as far as the storage yard of the company extends. The company has a railroad yard there, where they store railroad cars, rails, coal, etc. The south track extends westerly about 200 feet beyond the southwest crossing. He calls it a dead track because it does not lead anywhere; it just stops. The westerly end of this track from the southwest crossing is used to put in coal, railroad ties, iron, etc., for the use of the company; that is all it is used for. They put coal in there and unload it, and when they want it for their switch-boxes they haul it around to them. No portion of this track lying west of the southeast crossing is used for shifting or making up trains. That he has lived there all his life and has never seen any shifting or making up of trains at that point; has seen two or three flat cars there, or a load of coal or cinders, or a car containing railroad ties or iron rails. They did not store their passenger cars there; they took them further east (Rec., p. 17).

CROSS-EXAMINATION: Has seen the company shifting cars on the "ladder" track west of the southwest crossing of South Capitol street, but they were cars loaded with coal, lumber, rails, or something for their own special use, and bases this statement upon his observation year in and year out. These cars were left there. He has seen them shifted in, but could not say that he has seen them pulled out, but he is satisfied that this was done. That it would be necessary to pull them over this crossing in order to get them out. * * * As a rule, they contained coal, rails, and such stuff as that, and he assumed the material contained in the cars belonged to the company, because it was put in the company's yard, but as a matter of fact does not know of his own knowledge that the end of that track was used simply for the cars containing material belonging to the company (Rec., p. 17).

REDIRECT EXAMINATION: He supposes the railroad company owned the material that was unloaded or stored at the

end of the yard on that "ladder" track because he has seen them haul coal around to the switch-box for the men to use and naturally supposed it was their material; there is no freight yard there. It is a private yard. They use this track in connection with their storage yards (Rec., p. 19). The shifting in front of his house was generally done on the north track; they could only go about half way of the block on the south track (Rec., p. 20).

Kappel: "The portion of the 'ladder' track lying west of the southeast crossing is used for storing gravel cars and unloading coal. When they unloaded it, they shoved it down there alongside of the property yard of the railroad company and put it right over the fence. It was never used for shifting or for making up or breaking up trains or for storing passenger cars. The portion of this track east of the tower was used for shifting cars. The portion west of the tower was hardly used at all—just for storing a couple of cars down there. * * * The 'ladder' track west of the southeast crossing is always rusty, and the track that is used for shifting purposes is always bright" (Rec., p. 22).

CROSS-EXAMINATION: He notices the rust upon the south track nearly every time he passes there; noticed it "this morning;" there are four rails there that are bright—two are rusty and two others are not so rusty; has noticed this condition ever since he has been crossing there for the last 20 years; this rust was west of the southwest crossing; did not testify about the rust on the tracks at the former trial, because he was not asked the question; was asked about it this morning by plaintiff's counsel for the first time; the south track is pretty well rusted—is rusty all the time; he knows two tracks are bright, and the track furthest north not as bright as the middle tracks (Rec., p. 23); the western end of the south track was used for storing cars and taking cars in and out for the purposes of

the property yard; has seen these cars lie there two or three weeks after they were unloaded; they might have taken the cars out immediately after pushing them in, but did not see them take them out; the two cars that were on this track when Landrigan was killed had been there two or three days; that he did not know whether or not these cars had been pulled out and put back during these two or three days, but he noticed the number of one of the cars and the other looked like the same car (Rec., p. 23). * * * that this track was only an outlet to the east, but in this respect it is similar to every other track in the yard; the only way it differs from them is that it is about eight or ten hundred feet from any switch along there; on the east this track communicates with every other track in the yard by a switch (Rec., p. 24).

REDIRECT EXAMINATION: There was no shifting and making up or breaking up of trains on the southwest crossing on the south track; that this was done east of that crossing, and the only trains that crossed there, freight or passenger, were the trains that were already made up; that once in a while a passenger engine comes down from the Jersey yard, on the north side of the crossing, and switches off on another track to get a car or something like that (Rec., p. 25).

Martin: Has seen a couple of cars standing on the south track west of the southeast crossing, but has never seen them make up trains there.

CROSS-EXAMINATION: Has seen cars run in on the south track and left there, but had never seen them pulled out; had caught cars on this south track near this crossing once or twice a week—cars that he had seen there contained coal; had frequently seen them move cars backwards and forwards across the southwest and southeast crossings of South Capitol street. Sometimes trains were made up there and sometimes trains came up from the other [end this has refer-

ence to the use of the tracks generally and not specially to the "ladder" track] (Rec., p. 25).

REDIRECT EXAMINATION: Saw them making up and breaking up trains to the east of the crossing, but they would pull cars over the crossing sometimes when they had a long train; that he believed he had seen trains crossing at that crossing more frequently in the daytime than in the nighttime.

RECROSS-EXAMINATION: He had never seen much shifting done there at night (Rec., p. 26).

Wilkinson: The end of the south track is generally used to stack cars.

CROSS-EXAMINATION: He had seen cars stacked in there most always when he would pass there; can only recall seeing them move cars in there on one occasion (Rec., p. 27).

Oeser: The end of the south track, west of the southeast crossing of South Capitol street, was generally used for coal cars; they made up and broke up trains to the east up at New Jersey avenue; had never seen them making up and breaking up trains as far west as the southwest crossing of South Capitol street (Rec., p. 28).

Miller: The south track west of the southeast crossing of South Capitol street he has always considered as a storage yard, running from New Jersey avenue, parallel to the property yard; he has never known them to make up a train there; the trains are made up further east, east of the southeast crossing.

CROSS-EXAMINATION: By storage track, he means that very frequently the cars containing railroad supplies stood there for a number of days without being unloaded; he never knew a car to be put in there except for the company's purposes; has often seen cars pushed in and pulled out of there over the southwest crossing of South Capitol street. Re-

direct: Where they make up their passenger trains (Rec. p. 29).

Tripp: The south track, known as the ladder track, west of the southeast crossing, was not used for anything but storage, as far as he knew; does not think they could use it for making up and breaking up trains, because it does not run over 200 or 250 feet from the southwest crossing; they stored their passenger cars in the Jersey yards where they make up trains, and also on the north track on Virginia avenue to the east of the southeast crossing, where they make up trains; the western end of the south track was used mostly for the storage of coal, as he supposed for the use of the railroad company (Rec., p. 29).

Mrs. Landrigan: About two weeks after her husband's death, she viewed the spot where the accident happened, and noticed that the rails of the south track at that point were rusty; that this rust extended from the end of that track to the southeast crossing; that east of the southeast crossing the tracks were brighter; that the two center tracks at the southwest crossing were very bright, but the track on the north was not quite so bright as the center tracks. She has seen cars loaded with coal and railroad ties standing at times on the south track west of the southeast crossing; this portion of the track was not used for switching purposes (Rec., p. 31).

As to the ladder track, at the point where the accident occurred, it is undisputed in the evidence that it was only used to store and stack freight cars, that passenger coaches were never stored there, and that no shifting (*i. e.*, making up and breaking up trains) of either freight or passenger cars was done on that end of this track. It surely cannot be said with any force or show of reason that the degree of care imposed upon Landrigan by the law was the same in crossing this track, little used at this point as it was, as it would have been in

crossing a such a track as that involved in the case of Shehan *v.* R. R. Co., *supra*. As was said by Mr. Justice Shepard in rendering the opinion of the Court of Appeals in the present case:

"Moreover, deceased was familiar with the crossing and the gate gave him no notice of anything that he did not already know in respect of the number, proximity and use of the tracks" (Rec., p. 61).

B—The Character of the Night—Obstructions to the View—Lights on the Car and in Vicinity of the Crossing.

The testimony, compiled carefully from the record and bearing on these points, is as follows:

Motley: There was a white light in the vestibule of the Pullman car that broke away—in the little dome-shaped arrangement in the roof of the car. This was the only light hanging in the vestibule, and there was no light on the platform. * * * (Rec., p. 8.)

The crossing was lighted by the street lamps located at each of the four corners, and there was an electric light in the reservation north of the tracks [at northeast intersection of South Capitol street and the railroad tracks] and another one south and east of the tracks near the signal tower (Rec., p. 9).

The lamp in the dome of the vestibule of the Pullman car had a white shade or globe underneath. It gave a bright light; you could see it all right. The lamp was inside of the door, and the door was closed. The glass in the door extended about half-way down, and the light shone through the glass in the door. You could see the light very plainly as you looked at it. The same sort of light was in both ends of this car (Rec., p. 10).

REDIRECT EXAMINATION: The nearest electric light to the point where Landrigan was killed was on the east side of the southeast crossing and north of the tracks. This light was about seventy-five yards from where Landrigan was struck (Rec., p. 10).

Willhoit: It was dark, night-time, and witness could not see (Rec., p. 13). There was a light on both ends of the coach. There was a light in the coach, but none on the back platform (Rec., p. 14).

Witness did not stop, because by the light being in the car he thought perhaps there was a porter or somebody in there (Rec., p. 15); knows there was a light in the west end of the car, the end going toward South Capitol street, which was the front end of the car the way it was moving. This light could be seen more plainly than a lamp. Such lights contain two burners, are lighted by oil, and are more brilliant than a lantern. The reflector is over the top of the light. There is a kind of white shade over them (Rec., pp. 15–16). * * *

REDIRECT: The light in the vestibule of the car could be seen by people on the ground. It hung down low and did not set right up in the dome. It had a shade over it, but he does not know whether you could call it a reflector or not. It was plain enough to be seen by anybody who was on the ground.

Webster—CROSS-EXAMINATION: Standing at the gate on the south side of the southwest crossing the gateman's box would break the view down this side track to the east, if you stood outside of the gate. You could look up the main track, he supposed, to New Jersey avenue, but he thought the watch-box would break your view of the south track to the east to a certain extent, if you were standing outside the gate. This box is 6 or 7 feet square. He could not say that a watch-box 6 feet square would prevent you from seeing a

train if it was coming along, but it would break your view, to a certain extent, in looking up the track; that when you stood on the inside of the gate, on the open space, you could look straight up the side track to the eastward, and there was nothing to break your view (Rec., p. 18).

REDIRECT EXAMINATION: Standing outside of the gates on the south side of this crossing two cars loaded with coal or other material on the end of this track would obstruct the view of a train coming from the depot, and you would have to get out on the track if you wanted to look up the track a couple of hundred yards; that the watchman's box indicated on the map was right close to the ladder track, and farther up along that track is the tower-house, which is 25 or 30 feet high. This would have about the same effect to obstruct the view as the smaller watchman's box; it would not break the view of a train coming, but would obstruct the view and you would not have a clear view of the track; you could see one coach looking up there. * * * Witness stood on the ladder track on one occasion when the midnight express for New York was passing, and he considered it a safe place (Rec., p. 19).

Kappel: There was an electric light on thetnorth side of the southeast crossing, about 200 feet from where Landrigan was killed; had never noticed whether this electric light furnished any light of any consequence at the intersection of South Capitol street southwest; that if a train was standing on the north track, a few feet from the southwest crossing, it would have the effect of making it darker at the gates at the southwest crossing (Rec., p. 22).

CROSS-EXAMINATION: When he got there at night and found the gates down, he could not see whether there was a train in sight until he got out on the track and looked up and down; * * * the watch-box south of the ladder track interfered with the view down that track to the east; the closer you get the greater the obstruction from this box

and the further away the more view you had of that track; that he thought standing inside of the gates, the watch-box located outside the gates and next to the fence south of the track would prevent a person seeing anything up that track; that you would have to get on the track before you could see up there on account of this watch-box, the fence, and telegraph pole which were there; that west of the southwest crossing towards F street there is a curve; that you could not see around that curve until you got on the north side of the crossing; that although you could not see a train coming from that direction until you crossed the tracks, you could hear it unless there were two or three trains passing at the same time, or an engine blowing off steam; then you could not hear anything (Rec., pp. 24, 25).

Martin—RECROSS-EXAMINATION: When he approached the south side of this crossing in the daytime, it would be impossible to see towards the west, and very seldom to the east on account of the watch-box. * * * Re-redirect: The tool-house and lumber yard west of the crossing would prevent a person approaching the gate from the south from seeing an approaching train from the west; that if there were two cars standing on the south track he would be unable to see a train coming from the west unless he got outside of that track; that it would be harder to see at night than in the daytime (R., p. 26).

RE-RECROSS-EXAMINATION: Approaching this crossing from the south, after passing the gate and standing upon the space between the gate and the south track, there was nothing to obstruct the view unless a box car should happen to be standing there to the east; that the watch-box would not obstruct the view (Rec., p. 27).

Miller—CROSS-EXAMINATION: By going out on the first track you could get a very good view in both directions—probably further to the east than to the west; that if the

west end of the track were occupied by cars a person could not see any distance at all, and you would have to go past the cars that might be standing on that track. If you passed under the gate and were standing on the open space between the inside of the gate and the south rail of the southernmost track, you could see to the east a distance of about 100 feet or more (Rec., p. 29).

Jenkins: A Pullman car running slowly, as fast as a man would ordinarily run on a straight track, would make practically no noise at all—very much less noise than an ordinary passenger car; they were built purposely for that object; they are very much heavier than passenger coaches and more staunchly built; they are built with a longer truck and wheel base and softer springs; the light in the vestibule of a Pullman car is so located as to illuminate the platform only; that is the purpose of that light; it does not throw the light more than a couple of feet beyond the end of the bumper of the car; it is not intended to illuminate the track (Rec., p. 30).

CROSS-EXAMINATION: Such a light was not intended for a locomotive headlight; that if a man was standing on the track some distance from the advancing end of a car showing such a light he would not see the source of the light, but would see the reflected light on the platform on the car; he could see the illuminated end of the car. If he was not looking exactly in that direction this light would not attract his attention away from something else; if he were looking up the track, he could see the light, if he were not too far away (Rec., p. 30).

Mrs. Landrigan: The night her husband was killed was dark and cloudy (Rec., p. 31).

C—The Passing, at or about the Time of the Accident, of the Midnight Express for New York, Known as No. 78.

Willhoit—Direct Examination: Train No. 78, which left the depot about 11.55 or 11.35, was passing there about the time of the accident. This train No. 78 is known as the midnight express for New York, and crossed South Capitol street, where Landrigan was hurt, going in an easterly direction (Rec., p. 12).

Cross-examination: Witness jumped off the Lylete on the southeast side of South Capitol street; 78 passed first, and then he ran down the north-bound track behind the "Lylete" (Rec., p. 15). * * * The runaway car passed the southwest crossing of South Capitol street before No. 78 reached there. It struck just the middle part of No. 78 as the train came by there. The runaway car had just about gotten across the crossing when the engine of No. 78 began to cross the crossing. It was almost at the same time (Rec., p. 16).

Landrigan had been in the employ of the defendants for 8 or 9 years, in the round-house, as machinist. It can and should be assumed that he knew well the conditions in and about the "Jersey yards"; the character of the "ladder" track, the use to which the portion of it west of the southeast crossing was put; the fact that Pullman and other passenger coaches were never stored or stacked as far west as the southwest crossing of South Capitol street, and that no shifting was ever done on that end of this track.

Is it not fair to assume that, knowing the conditions above stated, he did look and, looking, saw the train of passenger coaches in Motley's charge going *east* along the ladder track, away from the crossing where he was to pass? Would he

not have a right to infer that the coach or coaches would not come *west* if he saw the train *already* going *east*, and knew that no shifting was done at or near the southwest crossing and that no passenger or Pullman cars, such as Motley's train consisted of, were ever shifted or stored at the crossing, or caused to pass over it?

There is another factor to be reckoned with in passing upon this question, to wit, the passing, at that time, of No. 78.

Landrigan may have looked and seen the shifting train going *east* and *from* him, as suggested above, or he may have looked at the moment of attempting to cross the ladder track, where his vision was obscured by the smoke from the locomotive of No. 78, blown across the ladder track, the character of the light in the "Lylete" increasing the probability of just such an obstruction. He may have listened while the roar and rush of the coming express destroyed the little noise the slowly moving Pullman made as it came down this ordinary grade of the "ladder" track. He may have gone under the gates, stood on the vacant, safe place between the gate and the "ladder" track to ascertain the approach of No. 78 (for the witnesses say he would have to do this to have a view unobstructed), and, seeing No. 78 *coming toward him* and the shifting train *going from him*, awaited the passing of the former.

Can it be said that the evidence here is so strong that the deceased did not look and listen "that all reasonable men must draw the same conclusion"?

How strikingly like the case at bar are the facts of the Merriman case, *supra*. Mr. Chief Justice Alvey thus states them:

"It is shown, however, that the condition of things existing at the crossing of the road at L street, where the accident occurred, was not favorable to entire safety to those using the crossing. It was near midnight that the accident occurred; the weather was blustering, and there was no

moonlight, and some of the witnesses speak of the night as cloudy and dark, but others say it was clear. The gates at the crossing were raised, and there was no watchman or light at the crossing. There was a passenger train coming into Washington that passed over the crossing just before the deceased reached it and attempted to pass over it. At the same time, coming out of Washington and going in the direction of Baltimore, were an engine and tender, and the proof is conflicting as to whether this engine and tender were running head or tender foremost. It was this engine with the tender that collided with the deceased and caused his death; the collision occurring at or near about the crossing. The meeting and passing in opposite directions of the passenger train, going into Washington, and the engine and tender going in the direction of Baltimore, occurred west of, but not very far from the crossing of L street. Some of the witnesses speak of smoke emitted from the passenger train, but others do not seem to have observed it."

The comment of this court upon the brief of counsel for railroad company in the Gentry cases furnishes such a conclusive answer to much of appellants' brief in this case that we quote from it the following:

"The counsel for the defendant, in their elaborate brief, say: 'Plaintiffs below cannot claim that the headlight of the engine did not illuminate and make plain to any one the flat car. They may contend that the headlight blinded the deceased. If this be true, he knew that switch-engines with flat cars attached in front and behind them were continuously moving in and about the yard, and if the light did blind him he knew then and there the blinding effects thereof, and it was as careless for him to step upon the track just in front of a car as it would have been for a blind man to have so acted. We submit that if he was blinded by the headlight that he was guilty of the grossest negligence, being blinded, in walking upon the track under the existing circumstances. We submit, however, that the evidence shows without contradiction that, by the exercise of ordinary care, he could have seen the flat car. We submit that a blind man who would attempt to cross the track just in front of the engine, the puffing and blowing of which he could hear,

hoping to get across the track before the engine could strike him, would be guilty of the grossest negligence. In this case the deceased was not blind. He could see the engine with its headlight illuminating 15 or 20 feet of the flat car next to the deceased, and lighting up the track for some distance ahead.'

"It is sufficient to observe that the evidence touching the matters referred to by counsel was not so clear and satisfactory as to justify the taking of the case from the jury upon the issue whether the deceased exercised due care under the circumstances which attended the occasion. It was properly left to the jury to determine whether, under all the circumstances, the effect of the headlight and flat car combined was to make the situation secure and safe to one who saw the headlight, but did not see the flat car in front of the locomotive. 'What may be deemed ordinary care in one case,' this court has said, 'may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court'" (Texas & Pacific Rwy. Co. *v.* Gentry, 163 U. S., 353).

Very little need be said of the complaint by appellants that the trial court refused sundry prayers offered by defendants and granted sundry prayers offered by plaintiff. They raise, in effect, the same question as that heretofore discussed, viz., whether it was error to refuse the motion to instruct the jury to return a verdict in favor of defendants.

Something has been said about error having been charged in the refusal of the court to instruct the jury in the exact

language selected by counsel for defendants. Mr. Justice Bradley, in The Continental Improvement Co. *v.* Stead, 95 U. S., 161, disposes summarily of this sort of contention.

"But a judge is not bound to charge upon assumed facts in the *ipsissima verba* of counsel, nor to give categorical answears to a juridical catechism based on such assumption. Such a course would often mislead the jury instead of enlightening them, and is calculated rather to involve the case in the meshes of technicality, than to promote the ends of law and justice. It belongs to the judicial office to exercise discretion as to the style and form in which to expound the law and comment upon the facts.

And referring specifically to one of the prayers offered, adds:

"It states such duty with the rigidity of a statute, making no allowance for modifying circumstances or for accidental diversion of the attention to which the most prudent and careful are sometimes subject; and assuming, in effect, that the duty of avoiding collision lies wholly or nearly so on one side."

It is submitted that there is no error disclosed in the record, and that the judgment of the court below should be affirmed.

J. J. Darlington.
Chas. A. Douglas.
Jos. D. Wright.

Supreme Court of the United States.

No. 71.—October Term, 1903.

The Baltimore and Potomac Railroad Company and The Philadelphia, Wilmington and Baltimore Railroad Company, Plaintiffs in Error, vs. Catharine Landrigan, Administratrix of the Estate of Thomas J. Landrigan, Deceased. } In error to the Court of Appeals of the District of Columbia.

[December 7, 1903.]

This action was brought under the death statute of the District of Columbia for damages for the death of the husband and intestate of defendant in error. The death was the result of injuries alleged to have been caused by the negligence of the plaintiffs in error. The negligence is alleged to have consisted in the insufficient coupling of the cars of the plaintiffs in error, whereby one broke loose from the others and ran over the deceased, in not equipping the car with good brakes, and not having upon it a light sufficient to give warning of its approach. The answer was not guilty.

The case was tried to a jury, which returned a verdict in favor of the defendant in error in the sum of $6,500. This amount was agreed to as correct if the jury should find on the other issues for the defendant in error.

Judgment was entered for that amount and costs. It was affirmed on appeal to the Court of Appeals of the District

The testimony is somewhat long, and we think it is only necessary to give an outline of what it tended to prove to illustrate and determine the questions presented.

The plaintiffs in error operated a steam railroad in the city of Washington, District of Columbia, and maintained four tracks on Virginia avenue southwest, crossing South Capitol street. The most northerly of the tracks, called "The Reservation" or "No. 1" track, was used for freight and shifting purposes. The two intermediate tracks were used for south bound and north bound passenger traffic. The most southerly track was called the "ladder" or "lead track." It was so called because all the tracks in the railroad yard were connected with it, and all the switches lead into it. It extended west across South Capitol street to an alley, and terminated at what was known as the property yard, where coal, ties, iron and other commodities were stored. Gates and a gateman were maintained at the crossing. There was evidence tending to show that the portion of this track lying west of the crossing was used for storing freight cars, but

not passenger coaches, and that no portion lying west was used for shifting or making up the trains; but there was also evidence tending to show that it was so used as occasion required. Landrigan's body was found at the southwest crossing, south of the "lead track," "but nearer the track than the gate," and there was flesh and blood alongside of the track on its south side. There was also testimony tending to show that the gates were generally kept down (one witness testified that in his experience they were always down) from ten or eleven o'clock at night until next morning, whether trains were passing or not, and persons with vehicles sometimes found it necessary to request the gateman to raise the gates, and sometimes to wake him up out of sleep for that purpose. Preceding and at the time of the accident a switching crew was making up a train of cars for the transportation of troops to the south, and it became necessary to "cut out" a Pullman car, called the "Lylete," which was standing on one of the tracks. Immediately next to it was a tourist car. It was equipped with a Miller coupler; the Pullman with a Janney coupler. Both couplers were of the automatic type, but of different patterns, and not designed to couple together, and in order to draw the cars out on the "ladder" track they were coupled together with the ordinary link and pin coupling.

There was considerable testimony as to the manner in which the coupling was done, and of its efficiency, which testimony it is not necessary to detail. It went to the jury with the other testimony. It is enough to say that the couplers were of unequal height, and the link could not be put in the slot of both couplers. It was put in the slot of the Janney coupler, and the other end laid on the top of the Miller coupler, "and the only thing to keep the link from slipping over the head of the pin was a shoulder around the head of the pin." It came loose, and one of the employes, who had been in charge of the train, testified that "the couplings 'slipped around,' he supposed, when they were going around the curve, and that had the tendency to make them come apart; that he supposed it was due to the slack caused by coming over the switch and 'the ladder' track." The "ladder" track had a slight incline to the crossing, and when the car broke loose it started towards the crossing. An employe had tried the brake on the straight track, but when some one "hollared" that the car had broken off he "went to work on the brake again." "It did not seem to catch hold," he testified; and he then "dropped off the end of the car and caught the rear end of it—the head end—and at the same time Hottal (yardmaster) got on the end that he got off of; the witness called for Wilber to help him to put the brake on, and they did all they could to stop the car, but the car had got too much start; the brake seemed to work all right—he did not have any fault to find with the brake, only the car had gotten too much start; he first tried the rear brake and could not get that to work; then went to the other one; while

witness and Wilber were working on the forward brake Hottal jumped on and tried to work the rear brake; they did not succeed in stopping the car, because it had gotten too much of a start. He got off at South Capitol street on the southeast side, stood there for a second or two, and then ran after the car to see what damage it had done. There were some other cars down on the end of this track, that this car ran into, and it would not have been safe for the witness to have stayed on the car."

The witness testified that he "did not know Landrigan personally; had seen him a number of times; he saw him after he was hurt; Landrigan's legs were run over, but he could not say whether it was by the car or another train; train No. 78, which left the depot about 11.55 or 11.35, was passing there about the time of the accident; this train No. 78 is known as the midnight express for New York, and crossed South Capitol street, where Landrigan was hurt, going in an easterly direction; when witness saw Landrigan the latter was lying on the south side of the outside rail of the 'ladder track,' the most southerly track of the four tracks of the crossing; immediately before he saw Landigran lying there the coach 'Lylete' passed over the crossing at South Capitol street and witness came right along behind this car, after train 78 passed, to see if the coach had done any damage down there and saw Landrigan lying there with some one around him; he went down where the car had stopped and came back and found out what the trouble was." As to the position of the gates, he said: "He first noticed the gates when he came down there after he had jumped off the end of the car; the gates were down then on both sides of the street. He did not notice the gates before 78 passed, because he had not been down that far; he stood on the southeast side of South Capitol street until 78 passed, and then started to run down the main track, and as he ran down the track he noticed that the gates were down on both sides." And further, "the runaway car passed the southwest crossing of South Capitol street before No. 78 reached there; it struck just the middle part of No. 78 as the train came by there; the runaway car had just about gotten across the crossing when the engine of No. 78 began to cross the crossing; it was almost at the same time."

There was a white light in the dome of the vestibule of the runaway car or on the platform, and the effect of the light was testified to as follows by one witness:

"The lamp in the dome of the vestibule of the Pullman car had a white shade or globe underneath; it gave a bright light—you could see it all right; the lamp was inside of the door and the door was closed; the glass in the door extended about half way down, and the light shown through the glass in the door."

By another witness:

"That the light in the car was in the dome—in the vestibule—just on the outside of the door, over the platform; he knows there was a light in

the west end of the car, the end going toward South Capitol street—which was the front end of the car the way it was moving; this light could be seen more plainly than a lamp; such lights contain two burners, are lighted by oil, and are more brilliant than a lantern; the reflector is over the top of the light; there is a kind of white shade over them; that the light in the vestibule of the car could be seen by people on the ground; it hung down low, and did not set right up in the dome; it had a shade over it, but he does not know whether you could call it a reflector or not; it was plain enough to be seen by anybody who was on the ground."

By another witness:

"That the light in the vestibule of a Pullman car is so located as to illuminate the platform only; that is the purpose of that light; that it does not throw the light more than a couple of feet beyond the end of the bumper of the car; it is not intended to illuminate the track.

"And thereupon, on cross-examination, said witness further testified that such a light was not intended for a locomotive headlight; that if a man was standing on the track some distance from the advancing end of a car showing such a light he would not see the source of the light, but would see the reflected light on the platform on the car; he could see the illuminated end of the car; that if he was not looking exactly in that direction this light would not attract his attention away from something else; that if he were looking up the track he could see the light if he were not too far away."

And the evidence showed "that a Pullman car running along an ordinarily straight track at a rate of speed a little faster than a man ordinarily runs, or can run, does not make any noise."

Landrigan was employed as a machinist and assistant boss on the night force at the round house, which was situated between H and I streets, on South Capitol street. He had been employed for eight years. His home was north of the railroad tracks on Virginia avenue, and the most usual and direct route to his home from the round house was up South Capitol street to the southwest crossing, "then right over to the north side of Virginia avenue; and it was the way Landrigan usually took." On the night of the accident he left the round house about 11.50 o'clock, and about twelve o'clock was found in the place and condition described in the testimony. The night "was not a clear night, nor was it a real dark night—there was no moon and there were a few clouds." The crossing was lighted up by street lamps located on each side of the four corners, and there was an electric light in the reservation north of the tracks, and another one south and east of the tracks near the signal tower.

There was testimony to the effect that to a person outside of the gate the flagman's box would "obstruct the view of the ladder track to the east, but one standing on the inside of the gate on the open space, you could look straight up the track to the eastward, and there was nothing to break your view." And also that two freight cars obstructed the view to the west.

There was no eyewitness to the accident, and Landrigan, in response to the inquiry, "How did this thing happen?" replied, "I came under the gates and something struck me, and a whole train of cars ran over me." He died about four o'clock without making further explanation.

At the close of the testimony the plaintiffs in error moved the court to instruct the jury to find a verdict for them. The court refused, and this is assigned as error. The case was then submitted on the evidence of the defendant in error.

Errors are also assigned upon the giving and refusing of certain instructions.

Mr. Justice McKenna, after stating the case, delivered the opinion of the Court.

The correctness of the ruling in denying the motion to instruct the jury to find a verdict for the plaintiffs in error depends upon the correctness of the ruling in granting or refusing the special instructions prayed. The principles embraced in them are but specifications of the legal propositions contained in the motion and upon which its soundness or unsoundness depended. If the ruling of the court was right on those instructions it was right on denying the motion. We proceed, therefore, to the consideration of the propositions embraced in the instructions.

The charge of the defendant in error is that the railroad companies were guilty of negligence. The railroads deny this, and claim besides that the deceased came to his death by his own negligence, or by negligence which contributed to that result. As an element in the question of the entire innocence of the railroad companies there is involved the construction and effect of the evidence in regard to the coupling of the cars and the sufficiency of the light upon the Pullman car to give notice and warning of its approach. In regard, however, to that evidence the instructions of the court are not questioned in this court. No error is assigned on them here, and whatever of argument is addressed to them or to the evidence is intended to show that those acts, even if they were acts of negligence, were not effective causes of the injury of the deceased, but that his own negligence was such cause. The determination of the contentions of plaintiffs in error, therefore, depends upon the question of the negligence of the deceased, and the instructions given in relation thereto. At the request of the plaintiff in the action, defendant in error here, the court instructed the jury as follows:

"1. In the absence of all evidence tending to show whether the plaintiff's intestate stopped, looked and listened before attempting to cross the south track, the presumption would be that he did. But that presumption may be rebutted by circumstantial evidence, and it is a question for the jury whether the facts and circumstances proved in this case rebut that presumption, and if they find that they do, they should find that he did not

stop and look and listen, but if the facts and circumstances fail to rebut such presumption then the jury should find that he did so stop and look and listen. In order to justify them in finding that he did not, all the evidence tending to show that should be weightier in the minds of the jury than that tending to show the contrary.

"2. The jury are instructed that if they believe from the evidence that the gates at the crossing where the deceased received his injury were generally kept down at night from 10.30 or 11 o'clock until the early morning, without regard to the approach or presence of a car, a train, or trains or locomotives, and shall further conclude from all the facts and circumstances of the case that the deceased had knowledge of that fact, then the circumstance that the gates at the intersection of South Capitol street were down at the time of the accident was not of itself a warning to him of the presence of danger, and contributory negligence cannot be imputed to him from that fact alone.

"3. While knowledge by the deceased of the presence of the Fenton engine on the north track or partly upon the South Capitol street crossing and the approach of No. 78 upon one of the central tracks at or near the time of the accident might or would indicate the presence of danger on or near those tracks, it is for the jury to determine upon all the facts of this case whether it was a want of ordinary or reasonable care and prudence upon his part to be upon the south track, at the point upon said last-named track at which they shall find from the evidence the accident occurred."

The defendants, plaintiffs in error here, submitted instructions to the court which were emphatic contraries of the instructions given at the request of the plaintiff, and expressed the law to be that the fact of the gates being down was of itself a warning to the deceased; and further, if he disregarded the warning, he was guilty of contributory negligence; and that the gates being down, they were "closed or lowered for all trains, cars or engines which were moving or passing or which might move or pass upon all or any of said tracks at said crossing and were a warning of danger which the plaintiff's intestate was bound to heed, and if the jury shall find that the plaintiff's intestate met his death by going under said gates and upon or so near to one of said tracks as to be struck by a car moving on said track, he was guilty of negligence contributing to the accident, and the plaintiff cannot recover in this action."

The following instruction was also prayed:

"It appearing from the uncontradicted evidence in the case that the defendants maintained at all hours of the night a gateman in charge of the gates at the crossing in question, who raised and lowered said gates as occasion might require, and it further appearing from such evidence that such gateman was accustomed to open or raise said gates for the passage of pedestrians or vehicles when it was safe to do so, and it further appearing that the crossing in question being adjacent to the shifting, storage and engine yards of said defendants and between such yards and their passenger and freight stations in the city of Washington, and that the main tracks leading to and from said station also passed over the same,

said crossing was an especially dangerous place, the jury are instructed that in the absence of any evidence tending to show that the plaintiff's intestate, upon approaching said crossing and finding the gates between him and the tracks lowered or closed, made any request of the gateman to raise or open the same or submitted any inquiry as to whether any engines, cars or trains were approaching said crossing before he went under said gates and entered upon the crossing within the same and thereby received the injuries which resulted in his death, said intestate was guilty of negligence directly contributing to his own misfortune and the plaintiff cannot recover."

(1.) There was no error in instructing the jury that in the absence of evidence to the contrary, there was a presumption that the deceased stopped, looked and listened. The law was so declared in *Texas & Pacific Railway Co.* v. *Gentry*, (163 U. S. 353, 366.) The case was a natural extension of prior cases. The presumption is founded on a law of nature. We know of no more universal instinct than that of self preservation—none that so insistently urges to care against injury. It has its motives to exercise in the fear of pain, maiming and death. There are few presumptions, based on human feelings or experience, that has surer foundation than that expressed in the instruction objected to. But notwithstanding the incentives to the contrary, men are sometimes inattentive, careless or reckless of danger. These the law does not excuse nor does it distinguish between the degrees of negligence.

This was the ruling in *Northern Pacific Railroad Company* v. *Freeman*, (174 U. S. 379,) the case which plaintiffs in error oppose to *Railway Co.* v. *Gentry*. In the Freeman case a man thirty-five years old, with no defect of eyesight or hearing, familiar with a railroad crossing and driving gentle horses which were accustomed to the cars, approached the crossing at a trot not faster than a brisk walk, with his head down looking at his horses and drove upon the track, looking "straight before him without turning his head either way." This was testified to by witnesses. There was direct evidence, therefore, of inattention. There is no such evidence in this case, and the instructions given must be judged accordingly. The court did not tell the jury that all those who cross railroad tracks, stop, look and listen, or that the deceased did so, but that, in the absence of evidence to the contrary, he was presumed to have done so, and it was left to the jury to say if there was such evidence. The instruction was a recognition of "the common experience of men," from which it was judged in the Freeman case that the deceased in that case had not looked or listened, and submitted to the jury that which it was their constitutional duty to decide. And there was enough evidence to justify dispute and from which different conclusions could be drawn.

(2.) We think there was no error in the instruction as to the effect of the gates as a notice of danger under the practice of the companies.

Indeed, the instruction is so obviously right that argument advanced to support it drops into truisms. One thing or condition cannot be any certain evidence of another thing or condition unless they invariably co-exist. Of course, two things may occasionally co-exist, but this furnishes no argument for plaintiffs in error. It only raises the query, when do the things co-exist, and, making an application to the pending case, when did the closed gates and passing trains co-exist? When were the former a witness of the latter? Always? The testimony answers, no. Between 10.30 and 11 o'clock at night, until morning, the gates were generally kept down without regard to passing trains. During that time, therefore, they had no more relation to passing trains than the signal tower or any other inanimate object at or near the crossing. Gates at a railroad crossing have a useful purpose. Open, they proclaim safety to the passing public; closed, they proclaim danger; but, it is manifest, if they be open or closed, regardless of safety or danger, they cannot be notice of either. Counsel perceive this and extend their contention to urging that it is the duty of those who want to cross, be they pedestrians or those driving teams, to seek the gateman and not to attempt to cross until he raise the gates.

Those driving teams must do so if they pass at all, and a controversy such as this record presents could not occur as to them. But there are more who walk than ride, and every time their way is stopped by gates at a railroad crossing must they awake a sleeping gateman, or seek an absent one, or be charged with negligence, and that despite the fact that the practice of the railroad company has made closed gates not necessarily an indication of danger? The contention makes the neglect of duty by the railroad as efficacious as the performance of duty. At times a railroad must have exclusive use of a crossing, but at such times it is its duty to close the gates. The use over it is its duty to open them, and it cannot neglect that duty and claim the same consequence as if it had been performed. The instructions of the court were very guarded. It told the jury if the gates where the injury occurred were generally kept down at night from 10.30 or 11 o'clock, without regard to the presence or absence of trains, and that deceased had knowledge of that fact, then "the circumstance that the gates at the intersection of South Capitol street were down at the time of the accident was *not of itself* a warning to him of the presence of danger, and contributory negligence cannot be imputed to him from that fact alone."

The italics are ours, and the words italicized put a careful limitation upon the instruction, and, so limited, it was not erroneous.

(3.) It was an issue in the case whether the deceased was struck and run over by the Pullman car or by the passenger express No. 78, and on that issue the court instructed the jury that if the deceased was struck and

run over by the passenger express, their verdict should be for the plaintiffs in error. This instruction is complained of. Plaintiffs in error contend that there was no evidence from which it could be determined that it was the Pullman car and not the passenger express train which injured the deceased, and it was error, therefore, to submit the issue to the jury. The action of the court was right. There was certainly evidence on the issue from which reasonable men might draw different conclusions.

As we have already seen, the most direct evidence of the passing of the north bound express was to the effect that "the runaway car passed the southwest crossing before 78 (the passenger express) reached there; it struck first the middle part of No. 78 as the train came by there; the runaway car had just about gotten across the crossing when the engine of 78 began to cross the crossing; it was almost about the same time."

If it be admitted that this leaves the issue in doubt, and justifies no inference, there are circumstances to be considered. If the deceased was struck by No. 78, it is difficult to understand how he got to the place and in the condition he was found. Was he hurled there by the impact of the train? If that were possible, how came his legs to be crushed? Not by the runaway car, because that had passed; not by train 78, for he had been cast aside and away from that. The circumstances, therefore, seem to indicate that he was not struck by train 78, but was run over by the runaway car, and, we think, there is nothing inconsistent with that conclusion in his statement. His situation was horrible. If in our different situation we may venture to judge of it at all, we may wonder that he had or could retain any perception of what had occurred. Certainly exact accuracy of statement could not have been expected of him, and to his shocked and almost overwhelmed senses it might well have seemed that not one car only, but a train of cars had run over him. Finding no error in the record, the judgment is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.